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90-1429

# No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

ERIC C. RAJALA, Trustee in Bankruptcy
for GENERAL POLY CORPORATION,
*Petitioner,*

vs.

ALLIED CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Did the Court of Appeals, in finding that the evidence was insufficient to support the verdict for the plaintiff, depart from the standards that this Court imposed to protect the Seventh Amendment right to a trial by jury?

2. Did the Court of Appeals, in refusing to give the District Court an opportunity to consider the plaintiff's request for a new trial after the Court of Appeals reversed a judgment for the plaintiff on a jury verdict, depart from the standards that this Court imposed to protect the Seventh Amendment right to a trial by jury?

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ERIC C. RAJALA, Trustee in Bankruptcy
for GENERAL POLY CORPORATION,
*Petitioner,*

vs.

ALLIED CORPORATION,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner Eric C. Rajala, Trustee in Bankruptcy for General Poly Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding.

### OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 919 F.2d 610 and is reprinted in the Appendix at A-7 through A-53. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is not reported. It is reprinted in the Appendix at A-6.

The memorandum opinion and order of the United States District Court for the District of Kansas denying judgement notwithstanding the

verdict or a new trial to respondent is not reported. It is reprinted in the Appendix at A-54 through A-161. The memorandum opinion and order of the United States District Court for the District of Kansas addressing respondent's motion for summary judgment is reported at 66 B.R. 582 and is reprinted in the Appendix at A-163 through A-200.

## JURISDICTION

The Tenth Circuit's opinion was entered on November 2, 1990. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied by order dated December 14, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides in pertinent part: "[T]he right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

## STATEMENT OF THE CASE

General Poly Corporation ("General Poly")[1] and Allied Corporation ("Allied") at one time shared the common goal of developing a new product in the plastic film industry. To accomplish this goal, they assisted each other by sharing expertise, personnel, financing, and testing facilities. General Poly built a plant to produce this new product. The venture became a financial failure for General Poly, however, when Allied failed to supply promised raw materials, and General Poly's creditors forced it into bankruptcy. General Poly contends that its financial collapse was directly attributable to Allied's misconduct. General Poly asserts that Allied fraudulently induced it to enter into a relationship with Allied to develop the new product, and then used and abused that deceptively-created relationship until Allied gained the market entry that it coveted. After being forced into

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[1] General Poly Corporation has no parent or subsidiary corporations. *See* Sup. Ct. R. 29.1.

bankruptcy, General Poly sued Allied in federal court based on diversity jurisdiction and asserted fraud, breach of contract, breach of fiduciary duty, and other claims.

The trial lasted three months. On Allied's motions for directed verdict, the District Court concluded that the appropriate cause of action for General Poly under Kansas law was breach of fiduciary duty. The court thus submitted to the jury only that claim. After deliberating for three weeks, the jury awarded General Poly $10,335,810 in compensatory damages and $60,000,000 in punitive damages.

The District Court denied Allied's motion for judgment notwithstanding the verdict or a new trial. In considering this motion, the District Court reviewed the trial transcript consisting of approximately 6,000 pages, numerous exhibits, and all of its prior rulings. *See* A-59. It concluded in a 137-page opinion that "[t]he evidence . . . clearly supports the jury's verdict." *Id.* at A-71.

On appeal pursuant to 28 U.S.C. § 1291, the Court of Appeals held that the District Court improperly denied j.n.o.v. to Allied because there was insufficient evidence of a fiduciary relationship. The court's dissatisfaction with General Poly's evidence focused on the intent element of an implied-in-law fiduciary relationship. It held that this intent element required evidence that Allied consciously assumed or accepted fiduciary duties, *i.e.*, that Allied entered into a relationship knowing that, by doing so, it was taking on the duties of a fiduciary. Finding that General Poly could not meet this strict evidentiary requirement, the Tenth Circuit directed the District Court to enter judgment for Allied. The court also denied General Poly's petition for rehearing and suggestion for rehearing en banc, in which General Poly urged the court to at least give the District Court an opportunity to consider whether a new trial was warranted on any of General Poly's claims.

## REASONS FOR GRANTING THE WRIT

### I. THE TENTH CIRCUIT'S OVERREACHING SCRUTINY OF THE EVIDENCE AND IMPOSITION OF AN EVIDENTIARY REQUIREMENT UNWARRANTED BY STATE LAW SO DEPART FROM THE STANDARDS THAT THIS COURT ESTABLISHED FOR REVIEW OF PLAINTIFFS' JURY VERDICTS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

#### A. The Supreme Court's Power, Even If Used Sparingly, to Review Decisions of the Courts of Appeals That Take Away Jury Verdicts for Evidentiary Insufficiency Serves as an Important Check in Our Judicial System.

In recent years, the Court has declined to review decisions turning on the sufficiency of the evidence. Although this petition seeks review on such grounds, it presents more than just the opportunity to correct the error in this particular case. For the last quarter century, the Court has allowed the courts of appeals to be the final arbiters of issues of evidentiary sufficiency by applying the standards established by the Court. As with any discretionary doctrine, however, the Court cannot abandon the area completely, lest the standards on which discretion rests gradually disappear. This case is a prime example of an appellate court that overlooked the limitations on its reviewing authority that must be scrupulously observed for the federal judicial system to function fairly and constitutionally. This case presents an important and timely opportunity for this Court to remind the courts of appeals of those limitations.

The Court has not always been so reluctant to review decisions turning on the sufficiency of the evidence. At one time, the Court reviewed such cases with some frequency to protect the Seventh Amendment right to trial by jury.[2] Because appellate courts encroached on

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[2] See, e.g., *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355 (1962); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959); *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29 (1944).

Seventh Amendment values by over-zealously scrutinizing the evidence supporting the jury verdict, the Court repeatedly emphasized the limited role of an appellate court reviewing the sufficiency of the evidence. The Court declared that "[i]t is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). The Seventh Amendment forbids such overreaching. "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.*

Justice Frankfurter opposed expending the Court's limited resources on cases involving challenges to the sufficiency of the evidence. In his dissents and concurrences, he cautioned against the practice of granting certiorari to "do justice" in individual cases because doing so "works inroads on the time available for due study and reflection of those classes of cases for the adjudication of which this Court exists." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458 (1959) (Frankfurter, J., dissenting). Gradually, Justice Frankfurter's reasoning prevailed. After establishing standards for reviewing jury findings and defining the circumscribed role of appellate courts in such review, the Court placed primary responsibility for reviewing such cases with the appellate courts. The Court was thus free to devote its scarce resources to other matters. For twenty-five years now, the courts of appeals have been entrusted with preserving the historic respect for the jury's role in the administration of justice that is fundamental to our system and embodied in the Seventh Amendment.

The problem is that adherence to the standards that the Court has established has diminished over the years and was disregarded by the Tenth Circuit in this case. Although appellate courts pay lip service to the limits on their reviewing authority, this professed respect for jury findings sometimes has been superficial; that is the situation presented here. General Poly is not advocating that the Court pore over the record line-by-line to allow litigants in all cases another chance to dispute the evidence. Justice Frankfurter's opposition to such a practice provides

ample reasoning for declining that role for the Supreme Court. This Court, however, occasionally must exercise its supervisory authority to examine whether the courts of appeals are indeed reviewing sufficiency of the evidence issues in the manner intended by the Court.

The possibility that the Court will exercise its discretion to review such a case is an important check in our judicial system. In our system, fact finding and weighing the evidence are entrusted to the jury. The permissibility — indeed, the constitutionality — of judicially overriding a jury verdict depends on adhering to the Court's standards for protecting the fact-finding province of the jury. By reviewing this case, in which the Tenth Circuit overreached, the Court can remind appellate courts to adhere to the limits on their powers of review and thus better ensure that the right to trial by jury is not eviscerated.

### B. The Tenth Circuit Engaged in Impermissible Fact Finding and Imposed an Evidentiary Requirement Unwarranted By, and in Derogation of, State Law.

The Tenth Circuit overstepped the boundaries of an appellate court reviewing jury findings. It resolved conflicts in the evidence. It reweighed the evidence. It demanded more evidence than state law requires with the effect of curtailing the well-established cause of action for breach of an implied-in-law fiduciary relationship. The Court of Appeals' strict scrutiny of General Poly's evidence resulted in this heightened, federally-created evidentiary requirement. Because the Tenth Circuit's departure from this Court's standards has had the effect of upsetting state substantive law, this case calls for an exercise of this Court's power and responsibility to remind appellate courts of the necessary limits on their reviewing authority.

This case involved an implied-in-law fiduciary relationship between General Poly and Allied. Kansas law does not precisely define when such a relationship arises because it depends on the individual facts and circumstances. *See Denison State Bank v. Madeira*, 640 P.2d 1235, 1241 (Kan. 1982). The Tenth Circuit, however, so intensely scrutinized General Poly's evidence that General Poly could not prevail without showing that Allied "consciously assumed" or "consciously accepted"

fiduciary duties, regardless of the other evidence showing that a fiduciary relationship existed.

This heightened evidentiary requirement was derived from language in *Denison State Bank* in which it was noted that "one may not abandon all caution and responsibility for his own protection and unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held as a fiduciary." *Id.* at 1243-44. Rather than recognizing this as a statement of general principle, the Tenth Circuit instead converted it into an additional element of proof. This strained reading of *Denison State Bank* is contrary to established law governing fiduciary relations:

> Once a relation is established, . . . its classification as fiduciary and its legal consequences are primarily determined by the law rather than the parties. Thus, unlike a party to a contract, *a person may find himself in a fiduciary relation without ever having intended to assume fiduciary obligations*. The courts will look to whether the arrangement formed by the parties meets the criteria for classification as fiduciary, *not whether the parties intended the legal consequences of such a relation*. If the criteria are satisfied, the fiduciary will be subject to the duties flowing from that relation, and the entrustor will be entitled to the resulting legal protection.

Frankel, *Fiduciary Law*, 71 Calif. L. Rev. 795, 820-21 (1983) (footnotes omitted) (emphasis added); *see also Roberts v. Sears, Roebuck & Co.*, 573 F.2d 976, 983-84 (7th Cir.), *cert. denied*, 439 U.S. 860 (1978).[3] Notably absent from the Kansas cases discussing fiduciary

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[3] In response to the defendant's argument "that a confidential relationship cannot be thrust upon an unknowing party," the Seventh Circuit in *Roberts* stated:

> That proposition, however, does not lead to the conclusion that a plaintiff must demonstrate by direct evidence that the defendant actually was aware of the confidential relationship. All that must be proved is that the parties engaged in activities under circumstances that created a confidential relationship and that defendant breached that relationship.

573 F.2d at 983.

relations is the "conscious assumption" notion upon which the Tenth Circuit dwelled. *See, e.g., Brown v. Foulks*, 657 P.2d 501, 506 (Kan. 1983); *Dugan v. First Nat'l Bank in Wichita*, 606 P.2d 1009, 1015-16 (Kan. 1980); *Wolf v. Brungardt*, 524 P.2d 726, 736 (Kan. 1974); *Lindholm v. Nelson*, 264 P. 50, 54-55 (Kan. 1928).

General Poly produced sufficient evidence to fulfill the intent element of a fiduciary relationship implied under Kansas law by establishing that the parties "willingly and knowingly act[ed] for one another in a manner to impose mutual trust and confidence." *Paul v. North*, 380 P.2d 421, 426 (Kan. 1963). Once the existence of this type of relationship is established, fiduciary duties are imposed regardless of whether the fiduciary knows of, or intends to take on, such duties.

By demanding evidence that Allied knew it was assuming and intended to assume fiduciary duties, the Tenth Circuit essentially eliminated the distinction between the two types of fiduciary relationships recognized under Kansas law — those created by contract or formal legal proceedings, and those implied in law. *See Denison State Bank*, 610 P.2d at 1241. An express agreement to assume fiduciary duties would create a fiduciary relationship of the first type, without regard to whether a fiduciary relationship would be implied in law. The Court of Appeals' heightened evidentiary requirement for implied-in-law fiduciary relationships wipes out the significance of this second type of fiduciary relationship, which has always been based on equitable considerations, *id.*, not on an "inten[t] to assume fiduciary obligations," Frankel, *Fiduciary Law*, 71 Calif. L. Rev. at 821.

This unwarranted and perhaps unintentional result stems from the Tenth Circuit's view that fiduciary relationships will rarely exist in the commercial context. *See, e.g.*, A-12, A-29, A-30. This view disregards settled state law recognizing that a commercial relationship may in fact create fiduciary duties. "Fiduciary relationships may . . . arise from contractual relationships involving joint business enterprises, where one party has superior knowledge and the other party relies on him." *Brown v. Foulks*, 657 P.2d at 506. "They may arise out of conduct of the parties evidencing an agreement to engage in a joint

enterprise for the mutual benefit of the parties." *Paul v. North*, 380 P.2d at 426. By over-zealously scrutinizing the evidence, the Tenth Circuit unilaterally assumed responsibility for shaping Kansas law governing fiduciary relations. As a result, injured parties will now bear a heavier, federally-created evidentiary burden in recovering for breach of fiduciary duty in the commercial context. Whether such a result makes good policy is debatable; whether such policy-making — in the guise of reviewing the sufficiency of the existence — is within the ambit of a federal court in a diversity case is not.

## II. THE TENTH CIRCUIT'S REFUSAL TO GIVE THE DISTRICT COURT AN OPPORTUNITY TO CONSIDER GENERAL POLY'S REQUEST FOR A NEW TRIAL SO DEPARTS FROM THE STANDARDS THAT THIS COURT ESTABLISHED IN *NEELY V. MARTIN K. EBY CONSTRUCTION CO.* AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Tenth Circuit departed from this Court's standards not only by overscrutinizing the evidence supporting the jury verdict but also by foreclosing General Poly's opportunities for a new trial. The Court of Appeals disregarded this Court's pronouncement in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), that appellate courts should consider whether the district court is better qualified to pass on the new trial issue. *Neely* held that the court of appeals may, in the proper case, order judgment for the defendant and deny a new trial when the plaintiff's verdict has been set aside on appeal to "speed litigation and to avoid unnecessary retrials." *Id.* at 326. But *Neely* also held that this desire for judicial efficiency must be tempered by exercising "informed discretion" to decide whether the issue should be preserved for the trial judge. *Id.* at 328-29. Delegating the decision whether a new trial is justified to the trial judge, who has a "feel" for the case, is fundamental to this Court's standards for protecting a litigant's right to a trial by jury. The Court has not addressed this principle during the decades since *Neely*. It is time for the Court to reinvigorate this important principle.

Upon concluding that there was insufficient evidence to support the judgment, the Tenth Circuit was not required to direct the District Court to enter judgment for Allied. It could instead have reversed General Poly's judgment but granted a new trial. It could also have reversed General Poly's judgment and directed the District Court on remand to determine whether a new trial is warranted. *Id.* at 326-30; Fed. R. Civ. P. 50(d); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2540, at 615 (1971); 5A Moore's Federal Practice ¶ 50.15, at 50-109 to -111 (2d ed. 1990). The recommended course of action is to allow the district court to pass on the question of a new trial. *See* 5A Moore's Federal Practice ¶ 50.17, at 50-113 to -114 ("the trial court will ordinarily be the better forum for what amounts to the initial consideration of a motion for a new trial").[4] In *Neely*, this Court explained why the district court is better qualified to consider the request for a new trial:

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues — because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

386 U.S. at 325; *see, e.g., Iacurci v. Lumnus Co.*, 387 U.S. 86, 88 (1967) (per curiam) (holding that the appellate court erred by not remanding to the district court to decide whether to grant a new trial because the trial judge "was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers").

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[4] *Accord* Louis, *Post-Verdict Rulings on the Sufficiency of the Evidence: Neely v. Martin K. Eby Construction Co. Revisited*, 1975 Wis. L. Rev. 503; Note, *Post-Verdict Motions Under Rule 50: Protecting the Verdict-Winner*, 53 Minn. L. Rev. 358 (1968).

In its petition for rehearing,[5] General Poly asked the Tenth Circuit to let the District Court pass on the new trial issue. The Court of Appeals summarily denied this request. This denial is particularly harsh and unjust in this case. The jury heard evidence for over two months and then deliberated for three weeks. It was so moved by the egregiousness of Allied's conduct that it awarded over $70 million in damages. The District Court believed that the verdict was well supported. *See, e.g.*, A-71 ("[t]he evidence . . . clearly supports the jury's verdict"); *id.* at A-89 ("Allied, through its actions, caused the ruination of General Poly"); *id.* (Allied's "conduct was entirely reprehensible"); *id.* at A-161 (The jury "reached a fair and impartial decision"). The District Court's belief that the verdict was justified is a constant theme throughout its lengthy opinion denying Allied's post-trial motions.

Moreover, the District Court's perception that the relationship between Allied and General Poly was a fiduciary relationship, rather than an ordinary, arm's length commercial relationship, heavily influenced the course of the trial. Based on this perception, the District Court concluded that the appropriate cause of action was for breach of fiduciary duty, not for fraud or breach of contract. The other theories of liability were never considered by the jury. This perception of the District Court — that breach of fiduciary duty was the proper theory — shaped the evidence and the arguments. Indeed, the District Court recognized that its trial rulings, if anything, prejudiced General Poly rather than Allied. *See* A-69, A-161. The District Court should have been given the opportunity to reconsider the verdicts that it directed against General Poly based on its conclusion that breach of fiduciary duty was the proper theory of liability. *Neely* declared that appellate courts "should be constantly alert" to such concerns. 386 U.S. at 325. This Court should take this opportunity to remind the lower courts of the principles announced in *Neely* so many years ago.

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[5] A petition for rehearing is an appropriate means by which to raise this issue. *Neely*, 386 U.S. at 329.

## Conclusion

For the foregoing reasons, petitioner Eric. C. Rajala, Trustee in Bankruptcy for General Poly Corporation, respectfully prays that the Court grant the petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

GEORGE E. FELDMILLER
(Counsel of Record)

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# APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

CASE NUMBER 82-2282-K

ERIC C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation

v.

ALLIED CORPORATION

**JUDGMENT IN A CIVIL CASE**

(Filed: Jan. 24, 1991)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum Order of January 18, 1991, judgment is entered in favor of defendant and against the plaintiff, and this action is dismissed with prejudice, costs assessed to plaintiff.

ENTERED ON THE DOCKET DATE: 1-24-91

January 24, 1991

RALPH L. DeLOACH
Clerk

/s/ Linda South
(By) Deputy Clerk

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 82-2282-K

ERIC C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation,
Plaintiff,

vs.

ALLIED CORPORATION,
Defendant.

**MEMORANDUM ORDER**

(Filed: Jan. 18, 1991)

Consistent with the mandate of the Tenth Circuit Court of Appeals, this court's order overruling defendant's motion for judgment notwithstanding the verdict is set aside, and as its consequence judgment should be and is hereby entered in favor of the defendant and against the plaintiff.

In light of this directive, this case should be and is hereby dismissed with prejudice, costs assessed to the plaintiff.

IT IS SO ORDERED this 18 day of January, 1991.

/s/ PATRICK F. KELLY, JUDGE

## APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

United States Courthouse
Denver, Colorado 80294
December 24, 1990

Mr. Ralph L. DeLoach
United States District Court
for the District of Kansas
122 U. S. Courthouse
812 N. Seventh Street
Kansas City, Kansas 66101

Re: 88-1727, Rajala v. Allied Corporation
(Lower docket: 82-2282-K,)
88-1762, Rajala v. Allied Corporation
(Lower docket: 82-2282-K,)

Dear Mr. DeLoach:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the judgment and a copy of the court's opinion, which constitute the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

Please call this office if you have questions.

Sincerely,

/s/ ROBERT L. HOECKER
Clerk

RLH:lwb
Enclosure

cc:

Charles M. Johnson
Elizabeth A. Phelan
Harry L. Hobson
Anthony J. Stewart
Brian D. Forrow
Martin J. Purcell
Douglas F. Behm
W. Dennis Cross
Byron J. Beck
Matthew J. Verschelden
Charles W. German
Julie M. Cheslik
Ronald L. Holt
Roger D. Stanton
Brent L. Brown

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1727 & 88-1762
D.C. #82-2282-K

ERIC C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation,
Plaintiff - Appellee/
Cross/Appellant,

v.

ALLIED CORPORATION,
Defendant - Appellant/
Cross-Appellee.

**JUDGMENT**

Entered November 2, 1990

(Filed: Dec. 28, 1990)

Before HOLLOWAY, SEYMOUR, and EBEL, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part. The judgment is reversed in part. The cause is remanded to the United States District Court for the District of Kansas to enter judgment in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Chief Deputy Clerk

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1727
88-1762

ERIC C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation,
Plaintiff-Appellee,
Cross-Appellant,

v.

ALLIED CORPORATION,
Defendant-Appellant,
Cross-Appellee.

**ORDER**

(Filed December 14, 1990)

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

Allied Corporation's request for costs and Mr. Rajala's petition for rehering [sic] are denied by the panel of judges who decided these appeals on the merits.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No active judge of the court having called for a poll, Mr. Rajala's suggestion for rehearing en banc is also denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Chief Deputy Clerk

## APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 88-1727
88-1762

ERIC C. RAJALA,
Trustee in Bankruptcy for GENERAL POLY CORPORATION,
Plaintiff/Appellee and Cross-Appellant,

v.

ALLIED CORPORATION,
Defendant/Appellant, and Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 82-2282-K)

(Filed: Nov. 2, 1990)

Brian D. Forrow (Thomas D. Kent, Anthony J. Stewart, Allied-Signal, Inc., Morristown, New Jersey; Byron J. Beck, W. Dennis Cross, Morrison, Hecker, Curtis, Kuder & Parrish; and Harry L. Hobson, Elizabeth A. Phelan, Charles M. Johnson, Holland & Hart, Denver, Colorado, on the briefs), for Appellant.

Charles W. German (Matthew J. Verschelden, Stinson, Mag & Fizzell, Kansas City, Missouri; Roger D. Stanton, Stinson, Mag & Fizzell, Overland Park, Kansas; and Brent L. Brown, Stinson, Mag & Fizzell, Dallas, Texas, with him on the briefs), for Appellee and Cross-Appellant.

Before HOLLOWAY, SEYMOUR and EBEL, Circuit Judges.

EBEL, Circuit Judge.

### INTRODUCTION

Because of the complex factual history of this action, the evidence relevant to each issue is set forth in the subsection addressing that

particular issue. The following is simply a brief summary of the events which preceded this litigation.

Plaintiff-appellee General Poly Corporation ("General Poly") was a manufacturer of plastic films used to manufacture products such as merchandise bags and rubbish can liners. Defendant-appellant Allied Corporation ("Allied") is a chemical company which produces, among other things, the resins used by manufacturers of plastic films such as General Poly.

Prior to the formation of General Poly, representatives of the yet unincorporated company met with Allied executives to discuss the development of certain high molecular weight ("HMW") resin products. HMW resins are desirable because their greater strength allows for production of a thin film comparable in strength to thicker films produced from other resins. At that time, there was no domestic producer of HMW resins.

The two companies entered into several agreements concerning the HMW resin. Allied proceeded with its development efforts, but its resin development did not meet General Poly's expectations. General Poly purchased substandard ("off-grade") HMW resin from Allied in order to fill some of its needs, although the majority of its resin was obtained from other sources.

General Poly ultimately was unable to operate as a profitable company. General Poly filed for protection in bankruptcy and the trustee in bankruptcy brought a variety of tort and contract claims against Allied in this action. The district court dismissed most of the claims by directed verdict and summary judgment. However, General Poly prevailed on its claim for breach of fiduciary duty, obtaining a jury verdict in its favor for just over $70 million dollars in compensatory and punitive damages. Allied appeals that jury verdict and the denial of its motion for j.n.o.v. General Poly cross-appeals the unfavorable directed verdicts on its other claims.

## DISCUSSION

I. *The Fiduciary Duty Claim*

The only claim brought by General Poly which survived Allied's motions for summary judgment and directed verdict was the claim for breach of fiduciary duty. The jury returned a verdict in favor of General Poly, ruling that Allied owed General Poly fiduciary duties and that Allied had breached those duties. Allied moved for judgment notwithstanding the verdict, arguing that the jury instructions misinterpreted Kansas' law of fiduciary duties and that General Poly had presented insufficient evidence to demonstrate either that Allied owed General Poly fiduciary duties or that Allied breached any such duties.

On appeal, Allied challenges the district court's denial of its motion for judgment notwithstanding the verdict on each of the grounds asserted below. In subpart one of this section, we set forth our understanding of the law of fiduciary relationships in Kansas. In subpart two, we review the evidence presented below and hold that Allied's motion for judgment notwithstanding the verdict was improperly denied because there was insufficient evidence of a fiduciary relationship.

A. *Fiduciary Duty Law in Kansas*

In *Denison State Bank v. Madeira*, 230 Kan. 684, 691, 640 P.2d 1235, 1241 (1982), the Supreme Court of Kansas summarized the law of fiduciary relationships as follows:

> It may be said that generally there are two types of fiduciary relationships: (1) those specifically created by contract such as principal and agent, attorney and client, and trustee cestui que trust, for example, and those created by formal legal proceedings such as guardian and/or conservator and ward, and executor and administrator of an estate, among others, and (2) those implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions.

Here, as in *Denison*, it is the second type of fiduciary relationship with which we are concerned.

Determination of whether this second type of fiduciary relationship " 'exists depends on the facts and circumstances of each individual case. [The Supreme Court of Kansas] has refused, for that reason, to give an exact definition to fiduciary relations.' " *Id.* (quoting *Curtis v. Freden*, 224 Kan. 646, 651, 585 P.2d 993, 998 (1978)). Although such fiduciary relationships cannot be defined with precision, the Supreme Court of Kansas has prescribed "certain broad principles which should be considered in making the determination of whether a fiduciary relationship exists in any particular factual situation:

> A fiduciary relationship imparts a position of *peculiar confidence placed by one individual in another*. A fiduciary is a person with a duty to *act primarily for the benefit of another*. A fiduciary is in a position to have and exercise, and does *have and exercise influence over another*. A fiduciary relationship implies a condition of *superiority of one of the parties over the other*. Generally, in a fiduciary relationship, the property, interest or authority of the other is *placed in the charge of the fiduciary*.

*Id.* (emphasis in original).

The court in *Denison* made clear that each of the general considerations listed above need not be present in every case in which a fiduciary relationship is alleged. However, the court emphasized that an overriding consideration in the law of fiduciary relationships was that "one may not abandon all caution and responsibility for his own protection and *unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary*." *Denison*, 230 Kan. at 696, 640 P.2d at 1243-44 (emphasis added). The court went on to state that "[t]his is particularly true when one . . . is fully competent and able to protect his own interests." *Id.*

A fiduciary relationship whereby both parties assume fiduciary obligations to each other or to a common entity similarly requires a conscious assumption of fiduciary obligations by the parties. For

example, in *Paul v. North*, 191 Kan. 163, 380 P.2d 421 (1963), the Supreme Court of Kansas stated that fiduciary relationships

> "may arise out of conduct of the parties evidencing an agreement to engage in a joint enterprise for the mutual benefit of the parties. . . . But they necessarily spring from an attitude of trust and confidence and *are based upon some form of agreement, either expressed or implied, from which it can be said that the minds have met in a manner to create mutual obligations*."

*Id.* 191 Kan. at 170, 380 P.2d at 426 (citations omitted) (emphasis added). Although a fiduciary relationship may arise out of an agreement to act together for the mutual benefit of the parties, such a relationship cannot be established by accident or inadvertence.

> "Mere concert of action without more, does not establish a fiduciary relationship. . . . Undoubtedly, parties may deal at arm's length for their mutual profit. It is only when, by their concerted action, they *willingly and knowingly act for one another in a manner to impose mutual trust and confidence that a fiduciary relationship arises*."

*Wolf v. Brungardt*, 215 Kan. 272, 285, 524 P.2d 726, 736 (1974) (emphasis added).

This court has also recognized that conscious assumption of the alleged fiduciary duty is a mandatory element under Kansas law. *See Hotmar v. Lowell H. Listrom & Co., Inc.*, 808 F.2d 1384, 1387 n.3 (10th Cir. 1987); *cf.* 36A C.J.S. *Fiduciary*, 385 (1955) ("As a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself, create the relationship") (footnotes omitted).

Although the courts of Kansas have suggested that a somewhat more protective approach may be used when one party is under a disability or disadvantage, *Cornett v. Roth*, 233 Kan. 936, 941, 666 P.2d 1182, 1186 (1983), *Wedman v. Home Nat. Bank of Arkansas City*, No. 88-1439-K (D. Kan., Jan. 25, 1990) (WESTLAW, 1990 WL

7501), this more protective approach will ordinarily not be utilized as between two or more business people or business entities who each possess the capacity to protect themselves. *See Ritchie Enterprises v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1054 (D. Kan. 1990) (holding that a seller's superior knowledge of a product does not justify imposition of a fiduciary relationship in the absence of a conscious assumption of fiduciary duties). The Supreme Court of Kansas has cautioned against an approach which would unfairly "convert ordinary day-to-day business transactions into fiduciary relationships where none were intended or anticipated." *Denison*, 230 Kan. at 696, 640 P.2d at 1243.

B. *Sufficiency of the Evidence Showing a Fiduciary Duty*

Allied made a motion for directed verdict at the end of plaintiff's case and again following presentation of its own evidence, both of which were denied as to the fiduciary duty claim. Following the trial, Allied moved for judgment notwithstanding the verdict, arguing that General Poly had presented insufficient evidence to establish the existence of a fiduciary duty. *See* R. Vol. 2, Doc. 729 at 22. The district court denied the motion, *see id.* at 27, and Allied appeals that ruling.

1. *Standard of Review & Burden of Proof*

We review *de novo* the denial of a motion for judgment notwithstanding the verdict applying the same standard of review as that used by the district court. *See Guilfoyle v. Missouri, Kansas & Texas R. Co.*, 812 F.2d 1290, 1292 (10th Cir. 1987). "Although we have often used different phraseology to express this standard," the inquiry is best summarized as "whether there is evidence upon which the jury could properly find a verdict for the party [against whom the motion is directed]." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir. 1984) (footnote omitted) (quoting 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2524 at 543 (1971)). In making that determination, we are obligated to view "evidence and inferences most favorably to the nonmoving party." *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988).

Because the directed verdict/judgment notwithstanding the verdict inquiry asks whether there was evidence such that the jury could have *properly* found for the party against whom the motion is made, we must necessarily frame our analysis in terms of the underlying burden of proof. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986) ("we are convinced that the inquiry involved in a ruling on a motion for . . . directed verdict necessarily implicated the substantive evidentiary standard of proof that would apply at the trial on the merits"). Under Kansas law a party seeking to establish the existence of a fiduciary relationship must prove it by clear and convincing evidence. "For the plainest of reasons, agreements establishing fiduciary relationships, if not in writing, must be clear and convincing. . . . A confidential relationship is never presumed, and the burden of proof is on the party asserting it." *Wolf* v. *Brungardt*, 215 Kan. 272, 284-85, 524 P.2d 726, 736 (1974) (quoting *Paul* v. *Smith*, 191 Kan. 163, 170, 380 P.2d 421, 426 (1963)).

2. *Evidence of a Fiduciary Relationship Presented At Trial*

General Poly maintains that the alleged fiduciary relationship was formed at the meeting of General Poly and Allied representatives held on January 10, 1979. *See* Appellee's Br. at 10. However, the jury was instructed that: "Plaintiff claims this relationship was formed in *late* January, 1979, when the parties began to pursue their joint development efforts in confidence and secrecy. Plaintiff contends the written contract signed in September of 1979 merely memorialized the parties' agreement to jointly develop resin and maintain secrecy, but that it did not change the nature of the parties' fiduciary relationship." R. Vol. 2, Doc. 660 (emphasis added). Because there is some discrepancy between the jury instruction and General Poly's position on appeal, we will not restrict ourselves to evidence of the January 10, 1979 meeting. What follows is a representative summary of the evidence presented at trial relating to the question of whether Allied consciously agreed to assume fiduciary obligations to General Poly.

*Events Prior To The January 10, 1979 Meeting*

The earliest contact between Allied and anyone involved in General Poly predates the formation of General Poly. Clayton A. Walker, who

would later become chairman of the board and treasurer of General Poly, testified that sometime prior to October 10, 1978, he contacted George Jecha, an Allied resin sales representative. R. Vol. 10 at 601. Walker testified that he asked Jecha "has Allied got anything, are they moving in any direction in high molecular weight high-density polyethylene and. . . . George told me yes. He said, as a matter of fact, he was aware, he didn't know exactly where they stood, but he knew that they were definitely interested in looking at developing high molecular weight high-density polyethylene product." *Id.* A meeting was scheduled in Houston between Allied representatives and Walker and his associates, Hans Traver and Edward Podolak. *Id.* at 603.

On or about October 11-12, 1978, a meeting was held at Traver's home in Houston. *Id.* Jecha attended the meeting on behalf of Allied, and Walker, Traver, and Podolak represented the then-unincorporated General Poly company. *Id.* Another Allied representative, technical specialist Pat Snell, was unable to attend the meeting but participated by telephone. *Id.* Walker testified that he and his associates "told George [Jecha] that we had to have a domestic source [of high molecular weight resin] and I further told George without belaboring the issue, that the reason I had called him is that I knew he would, that he would, within the realm of his knowledge, tell me the truth about exactly what Allied was doing." *Id.* at 605. Traver testified that Jecha did not tell him anything about Allied's plans for high molecular weight (HMW) resin but said "that to the best of his knowledge Allied was involved in the Baton Rouge group in developing such a high molecular weight resin; but he did not give me any great details." R. Vol. 24 at 2219. After the meeting, in a letter to Allied's high-density polyethylene (HDPE) national accounts manager, W. D. Singleton, Jecha wrote the following:

> Having known Bud Walker for so many years and now meeting Hans Traver, there's little doubt in my mind that if they put this new company together, our being in on the ground floor will be of great benefit as this first eight million pound requirement will be a drop in the bucket compared to what they will be using in years to come. My only concern at the moment is whether or

> not we can put together a suitable sample of the Lima, Peru operation to get this thing started.

R. Vol. 9 at 401; Plaintiff's Ex. 99 (First Addendum to Appellant's Br., Doc. 1).

In early November of 1978, Allied's technical specialist, Pat Snell, telephoned Traver to discuss HDPE resins. *See id.* In that conversation, "Traver indicated his willingness to offer the PeruPlast plant[1] for testing." R. Vol. 20 at 1478. After the phone conversation with Traver, in a handwritten note drafted on Jecha's memo, Snell stated that "[t]his would be a great opportunity to test the B5920F[2] [Solvay resin], test an Allied version of the same, and make an entry into the HDPE film market in the U.S." Plaintiff's Ex. 99 at 2.

In November 1978, Walker, Traver, and Podolak met with Allied's Singleton at a trade meeting in Chicago. R. Vol. 10 at 608. Podolak testified that when Traver mentioned to Singleton that the German Hoescht Company soon planned to open a resin plant to produce HMW HDPE in Texas, Singleton replied "Allied Chemical will have a product ready before the Germans have that plant up and running." R. Vol. 38 at 4190. According to both Podolak and Traver, Singleton further stated that Allied would sell its HMW resin at one or two cents a pound above the price for injection grade resin, an established HDPE resin. *Id.*; R. Vol. 24 at 2221. According to Walker, Singleton agreed to arrange a meeting between the promoters and Allied's "decision makers." R. Vol. 10 at 609.

*The January 10, 1979 Meeting*

A meeting took place at Traver's home in Houston on January 10, 1979. R. Vol. 24 at 2227-28. Traver and Walker represented the new

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[1] The PeruPlast plant was an extrusion operation run by Traver in Lima, Peru.

[2] The type of resin referred to as B5920F was a European brand of HMW HDPE produced by the Solvay company. The use of B5920F was licensed to Allied.

venture—General Poly. Jecha, Singleton, and Snell attended on behalf of Allied, as well as Donald J. Bonin, Allied's vice-president and general manager for HDPE products, and Paul Heath, Allied's HDPE marketing director. *Id.* at 2228.

Walker told the Allied representatives of the planned venture and the need for a domestic supply of HMW resin. R. Vol. 11 at 635. Walker testified that he told Bonin that it was necessary "to determine if [Allied] had a high molecular weight high-density poly material that was equal to or better than Hoescht. That was the whole basis of the project." *Id.* at 647. "I told Mr. Bonin that we had to have a domestic source of raw material and that that was essential to our project, that we couldn't, we could not rely on imported material and that was the only material that was available at that point in time." R. Vol. 37 at 3967. According to Walker, "Pat Snell and Don Bonin both confirmed that they had been working for some time on a high molecular weight high-density product and that the project was in super shape and they were moving right ahead; that they had anticipated that they would be the first in the business in the United States and that they had a time table and that they were moving toward that time table." *Id.* at 633. "Don Bonin told me and Pat Snell sat there and confirmed that all he had to do to develop that material, they had the reactors, they had just put in a new large reactor in Baton Rouge in anticipation of this and all they had to do was fool with the catalyst — 'tinker with the catalyst' were the exact words, and they would have a high molecular weight that was equal to the Hoescht material." *Id.* at 634; R. Vol. 37 at 3968.

Traver testified similarly, recalling that in response to inquiries about the status of Allied's HMW development project Bonin had responded "[w]ell we're working on it; we already have a catalyst, now we have to play with that." R. Vol. 24 at 2231. Traver further testified that Bonin said "the way it looks today we can have — we expect to have a resin out by the fourth quarter of the year, towards the end of the year." *Id.* According to Traver, Bonin asked him about General Poly's timetable and he replied "after the money had been raised and I was in a position to issue purchase orders, it would take me six months to get the main pieces of equipment in. So it would take, let's say, three

months to get the money together. . . . I could thereby meet the Allied time schedule." *Id.* at 2231-32.

> Walker testified that during the January 10 meeting he told Don Bonin that we had to accomplish the hurdle of financing the long-term financing on the equipment and the building and that in order to do that, I had used in the past — had used revenue bond issue as a vehicle to accomplish that financing. And that I anticipated that we would use the same method of financing of the General Poly plant in this case. I asked Don Bonin if Allied would guarantee or preferably buy the bonds on the bond issue as their financial contribution to the joint venture. . . . Don Bonin's response was that Allied would participate financially in some manner but that . . . he would have to visit with his associates . . . [and] get back to me as quickly as possible and see what could happen.

R. Vol. 11 at 656; *see also* R. Vol. 8 at 252.

At the same meeting, the two groups discussed plans to conduct a test of resin at Traver's plant in Lima, Peru. Walker testified that:

> I can recall that when Hans [Traver] went over the specifications on the equipment that he had in Peru and the type of equipment, it was German equipment, not any of that equipment available in the United States at that time, and Don Bonin was delighted to find out that that equipment was available and he asked Hans if they could utilize that equipment in some manner to further their technology in testing resins in Peru. Because he pointed out that one of the things they had, they had everything in place, they had everything from a manufacturing standpoint but they had no pilot plant or they had no equipment in their laboratory to actually make film. And that was — the proof of the pudding was to make film. So, he was delighted to find out that Hans had that equipment and Hans made it clear that he would make [available] that equipment and that technology, which included not only equipment, it included trained people, trained personnel, experienced force and technology.

R. Vol. 11 at 638. Walker explained that Bonin told Traver that he wanted to use Traver's extrusion technology "to test Allied's resins." R. Vol. 11 at 639. "Mr. Bonin told me that he wanted to test his material that they had recently run tests and he wanted to test his material to see also if it was equal to the Hoescht material. So that they'd know what they had." R. Vol. 12 at 755. According to Walker, "Bonin, Singleton, all of the people said that they had an experimental high molecular weight high-density poly product and they wanted to test it." *Id.* at 639-40.

Traver testified similarly, indicating that "the question was whether we could send experimental resins for testing to Lima." R. Vol. 24 at 2232. "[Bonin] asked me if he could use our facilities in Lima for that purpose, and I said, 'Well, of course, delighted to, anything to speed the project along.' " *Id.* "[H]e wanted to test the Allied resins. He wanted to see how the resins were doing." *Id.*

Other topics of discussion at the January 10 meeting were the quantity of HMW resin which Walker and Traver anticipated General Poly would need from Allied and the price at which Allied would sell HMW resin to General Poly. Traver explained the method by which he calculated General Poly's expected resin needs and said "I put down a capacity figure of six hundred thousand pounds a month." *Id.* at 2234.

> And then after we had those figures, well, Paul Heath says, "Well, Hans, how much you gonna buy from us?" And I said "Well, obviously at least fifty percent or we wouldn't be here with that many people, and if you want to, we can go a hundred percent but that's something we need to talk about. Depends on how good you're gonna be to me." ... That's about as far as we went in the meeting. ... Of course, it was understood it was going to be high molecular weight high-density polyethylene; but the specific quality of that resin was brought out during the meeting and the specific quality was a resin like the Hoescht 9255 F.

*Id.* at 2235.

Walker testified that the price of the HMW resin to be purchased from Allied was also discussed at the January 10th meeting. "Don

Bonin told me that they had to get a premium price over the injection molding grade resin and that their price would be what Singleton had said, depending on the market conditions, one to no more than two cents a pound over injection molding grade resin." R. Vol. 11 at 637; *id.* at 658. Walker testified that:

> [W]e agreed that we would buy our material — I agreed that we would buy — Hans and I were there. Hans agreed also we would buy our material from Allied, once developing the product, once having a resin and knowing that we had a resin, we would go ahead with the project, we would buy one hundred percent of our requirements from Allied. And we would buy it at a benchmark price of one to two cents a pound over injection molding grade resin; that I told Mr. Bonin that.

*Id.* at 658-59.

*Communications After the January 10, 1979 Meeting*

Although General Poly contends that Allied assumed fiduciary obligations at the January 10, 1979 meeting, it also argues that communications with Allied after the meeting further demonstrated the formation of a fiduciary relationship on January 10, 1979.

Walker testified that Bonin called him within a week of the meeting in Houston. R. Vol. 11 at 660. Walker further testified as follows:

> Mr. Bonin told me . . . that Allied would not undertake contingent liabilities of a financial nature without approval from the board of directors. . . . He had a counterproposal as far as financial help from Allied and their financial assistance in the joint venture and that was within the realm of his authority as general manager, he said: We will give you extended trade terms as a portion of our financial contribution. . . . Mr. Bonin told me when we first started buying the material that we would set it up to start with on ninety day terms and that these terms could be adjusted, depending on how the project progressed. . . . And that was agreeable with me because when we did our cash flows and ninety day terms on eight million pounds of product would have been the same thing

> as giving us an injection of capital or working capital that would have amounted to about 5 hundred thousand dollars.

*Id.* at 660-62. According to Walker, Bonin also said, "I'm going to forward you . . . the secrecy agreement that we talked about in our meeting of January the 10th." *Id.* at 664.

As discussed in his phone conversation with Walker, on January 23, 1979, Bonin sent Walker a letter containing the following statements:

> It is our intention, as stated to you in our recent meeting in Houston, to pursue the development of competitive polymers to satisfy [the] market. As you know we already supply some resins for the film market but feel that additional new resins are needed and can be developed to meet specific requirements such as yours.
>
> As discussed at our meeting with you and Mr. Hans Traver, we would like to have you evaluate these new resins as they are developed.
>
> We, therefore, are proposing that we enter into a joint technical development program with your commitment to test new resins at the Peru Plant in Lima, Peru. To this end we will be forwarding under separate cover a secrecy agreement required to insure the confidentiality of our joint effort.

Plaintiff's Ex. 139 (First Addendum to Appellant's Br., Doc. 3); R. Vol. 11 at 665. The next day, in a letter to more senior Allied management, Bonin wrote:

> Attached for your files is a review of all activities concerning General Poly to date. We are pursuing this matter in some detail because of the complexities involved in acquiring technical skills to penetrate the film market. In the absence of the pilot plant equipment for development work, we must develop a plan of "pulling ourselves up by the bootstraps" in this area.

> I believe that General Poly Corporation, if formed, offers us an opportunity for ground floor participation in a plant designed specifically for processing high density polyethylene film.

Plaintiff's Ex. 141 (First Addendum to Appellee's Br., Doc. 8).

On February 14, 1979, a draft of the agreement Bonin and Walker had discussed was sent to Walker. After a series of proposed changes and revisions and lengthy delays, a final copy was signed by the authorized representatives of both General Poly and Allied and dated September 21, 1979. That agreement [the "September 1979 Agreement"] provides, in relevant part:

> WHEREAS, Allied Chemical is a manufacturer of high density polyethylene resin;
>
> WHEREAS, General Poly desires to manufacture high density polyethylene films for which high density polyethylene resins having special characteristics may be required;
>
> WHEREAS, Allied Chemical and General Poly desire to enter into a period of joint cooperation aimed at developing and evaluating high density polyethylene resins having the characteristics required for the manufacture of such high density polyethylene films;
>
> NOW, THEREFORE, in consideration of the mutual understanding hereinafter set forth, it is agreed as follows:
>
> 1. *Joint Cooperation*. Upon execution of this agreement there shall commence a one (1) year period of joint cooperation in the performance of which Allied Chemical and General Poly shall cooperate with each other to develop high density polyethylene resins and films prepared therefrom.
>
> 1.1 During this period of joint cooperation, Allied Chemical shall have the royalty-free, exclusive right and license to use extrusion technology developed by General Poly. After this period of joint cooperation or extended period as provided for in Section 4.2 herein, Allied Chemical shall have a perpetual,

royalty free, non-exclusive right and license to use such extrusion technology.

1.2 For a period commencing with the production by Allied Chemical of a semi-commercial or commercial scale of any new high density polyethylene film grade resin developed and terminating three (3) years thereafter, it is agreed that General Poly shall have the first right to purchase such high density polyethylene film grade resin from Allied Chemical up to a maximum of 500,000 pounds per month. General Poly's first right to purchase film grade pursuant to this Section 1.2, however, shall be contingent upon General Poly giving Allied Chemical at least thirty (30) days' prior written notice of its requirements for each calendar month in which General Poly chooses to exercise its first right to purchase. With respect to each calendar month for which Allied Chemical receives no written timely notice, as provided for herein, Allied Chemical shall be relieved of any obligation to General Poly.

2. *Secrecy*. For a period of five (5) years from the date hereof, General Poly shall maintain in confidence all information disclosed to it in writing hereunder by Allied Chemical and Allied Chemical shall maintain in confidence all information disclosed to it in writing by General Poly relating to extrusion of high density polyethylene film. Each party shall take all reasonable steps and measures necessary to prevent disclosure of such information to third parties; provided, however, that the foregoing obligations shall not apply to any such information if and to the extent that:

(a) at the time of disclosure or subsequent thereto, through no fault of the receiving party, it was or it becomes known to the general public; or

(b) it had been independently perfected by the receiving party or was otherwise in the receiving party's lawful possession prior to disclosure, as shown by written records; or

(c) after such disclosure it is acquired from a third party which did not acquire the information under an obligation of confidentiality from or through the disclosing party.

Nothing herein shall prevent the use of such information in conjunction with the prosecution of patent applications, or as deemed necessary in conjunction with the sale of resin or film products.

3. *Patentable Inventions.*

3.1 Patentable inventions conceived or reduced to practice during and as a result of the joint cooperation provided in Section 1 hereof shall be treated as follows:

3.11 Such inventions shall be owned by Allied Chemical when the invention is directed to high density polyethylene resins, or processes for manufacturing the same;

3.12 Such inventions shall be owned by General Poly where the invention is directed to high density polyethylene film or processes for manufacturing the same;

3.13 The party owning any such invention may elect, at its own option and expense, to apply for patent coverage thereon;

3.14 No rights are hereby granted with respect to any inventions, patent applications or patents owned by either party other than those specifically provided for in this Section 3.

4. *Term and Termination.*

4.1 The period of joint cooperation hereunder shall be one (1) year from the date of execution of this agreement unless sooner terminated by either party by giving thirty (30) days' written notice to the other party. Termination of the period of joint cooperation shall not relieve the parties of their obligations under Sections 1, 2 and 3 hereof.

4.2 The period of joint cooperation hereunder may be extended by mutual agreement of both parties for such period or periods as the parties desire.

5. *Assignment.* This agreement shall be binding upon and inure to the benefit of the parties hereto and the respective successors and assigns of the entire business relating to the subject matter hereof but shall not otherwise be assigned by either party without the written consent of the other, and except as so provided, any purported assignment shall be void.

6. *Law Governing.* This agreement shall be governed by and construed in accordance with the internal laws of the State of New York without regard to conflict of laws.

Plaintiff's Ex. 420 (First Addendum to Appellant's Br., Doc. 8). General Poly maintains that the above written agreement served to memorialize certain aspects of the January 10, 1979 meeting in which Allied assumed fiduciary obligations.

3. *The Basis of the District Court's Denial of Allied's Motion For Judgment Notwithstanding the Verdict*

The district court denied Allied's motion for judgment notwithstanding the verdict, holding that "[t]he evidence presented at trial clearly supports the jury's verdict that a fiduciary relationship existed between the parties and that the fiduciary duties were breached by Allied." R. Vol. 2, Doc. 729 (Dist. Ct. Memorandum and Order, February 26, 1988, at 22). The court explained that "the evidence clearly shows, and the jury found, that a fiduciary relationship existed between these two parties from the beginning of their negotiations." *Id.* Although the district court concluded that the relationship was not a joint venture, the court nonetheless relied on joint venture principles for its conclusion. The district court explained its reliance upon joint venture principles as follows:

> Although I concluded at [the] summary judgment stage that a technical joint venture did not exist between these parties because they did not share profits, they did have a "joint cooperation

agreement" very similar to a joint venture agreement. Thus, the type of fiduciary duties existing between these parties may be best understood by recognizing its analogy to a joint venture relationship. . . . In a joint venture situation, the fiduciary relationship arises when the parties begin their negotiations. In 46 Am. Jur. 2d on Joint Ventures, the following general statement is made as to *when* the fiduciary relationship arises:

> The fiduciary relationship upon which such obligations are consequent does not necessarily await the inception of the relationship as joint venturers. It may be predicated upon an arrangement to assume such a relationship. Thus, it is the plain and imperative duty of promoters of a syndicate, toward persons who are invited to cooperate in the enterprise, not only to abstain stating as a fact that which is not a fact, but not to omit to state any circumstances within their knowledge the existence of which might in any way affect the extent of quality of the advantages held out as inducements to the others.

46 Am. Jur. 2d *Joint Ventures* § 50 (1969).

By analogy, the fiduciary relationship began between General Poly and Allied at the January 10, 1979 meeting when the parties agreed to enter a joint cooperation agreement and when Allied made certain representations about the extent of its resin development. Thus, at the time of the Peru test, Allied had a fiduciary duty to reveal the true source of the resin tested.

. . . .

Contrary to Allied's arguments, the evidence clearly shows that the parties did not have an ordinary buyer/seller relationship. When the parties' relationship began, Allied did not have a product to sell which General Poly could buy. In January of 1979, Allied represented to General Poly that it had developed an experimental resin but it still needed work. Allied needed General Poly's special equipment and specially trained people to

> help in this development. . . . Of course, unbeknownst to General Poly, Allied had not in fact developed any type of resin at all.

*Id.* at 23-25 (emphasis in original).

In reaching its conclusion, the district court emphasized that Allied sought to benefit through its cooperation with General Poly by developing an HMW resin which it did not have at the time a fiduciary relationship was allegedly formed. *See id.* at 25. The district court was persuaded that the written agreement "is highly unusual and not that of a typical buyer/seller." *Id.* The court also felt that evidence showing General Poly agreed to buy offgrade resin in part to assist Allied was indicative of a fiduciary relationship. *Id.* Finally, the district court pointed to the testimony by Allied's Jecha and Snell that the General Poly arrangement was a "unique" one as evidence that a fiduciary relationship was formed. *Id.* at 26.[3]

The district court concluded its analysis of Allied's motion for judgment notwithstanding the verdict by reiterating the following statement made earlier in rejecting Allied's motion for directed verdict on General Poly's fiduciary duty claim:

> Mr. Traver's testimony just cries out as regards the parties' mutual trust and their mutual risk in finally reaching a commercial high molecular weight resin. I believe that his letter of July 8, 1981, says it all in [stating that such a relationship existed] between a party (sic). In my view, and given definition of a

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[3] The district court also mentioned the fact that Allied intended to send a non-Allied HMW resin to the test in Peru as evidence that a fiduciary relationship existed between the parties. *Id.* at 26. However, it is unclear from the district court's order whether the evidence relating to the Peru test was considered as part of the analysis of the alleged duty or of the alleged breach of that duty.

> fiduciary, circumstances here are such that the jury may well find these parties were indeed fiduciaries. . . .

R. Vol. 41 at 4592.[4]

4. *Review of the District Court's Decision*

After carefully reviewing the evidence presented at trial, and viewing that evidence most favorably to General Poly (with all

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[4] The letter upon which the district court relied was written to Mr. Heath by Mr. Traver on July 8, 1981, and provides in relevant part as follows:

> Dear Paul:
>
> I believe that in the greatness (sic) of everyday business all of us concerned with the Allied-General Poly relationship have lost sight of what we did set out to do jointly two years ago: To develop for both companies a noteworthy participation in the exciting growth of high-density PE film. Allied's expertise in resin technology and its capital resources and GPC's efforts on the extrusion plant floor, as well as out in the marketplace, were to produce a film grade high-density resin equivalent to the best imported product. During these two years, as individuals and as companies, we all took substantial risk, suffered anxieties and failures, progressed and paid our dues for mistakes, as well as a success now in sight: An Allied film resin to be proud of. . . .
>
> We went together through the extended phase of resin testing while you did not have an extruder of your own. Whether at PeruPlast or General Poly, our people were at your disposal when you needed them. My fellow workers at General Poly, . . . struggled with your people, Pat Snell and the others, through extrusion trial after trial sharing disappointments and the joys of the achievement.
>
> Today success there is. You have arrived in the HD film resin markets and the industry knows it. You at Allied have reason to be proud of that, and while our contribution was minimal compared to your effort, we did do our bit.
>
> We also tried our best to live up to our promise to use the materials originating from last year's start-up runs in your plant. Never did we complain to you about the frustrating difficulties we went through when your resin simply wouldn't make a salable film. . . .

R. Vol 30 at 2821-25 (testimony of Hans Traver reading Plaintiff's Ex. No. 1621 into evidence). The rest of the letter details General Poly's dire financial state and requests Allied's assistance in saving the corporation.

inferences drawn in its favor), we are unable to affirm the district court's ruling denying Allied's motion for judgment notwithstanding the verdict. Our review of the record does not disclose any sufficient evidence upon which a reasonable jury could properly conclude that General Poly had established the existence of a fiduciary relationship with Allied. Although we would reach this conclusion even if General Poly was required only to show the relationship by a simple preponderance of the evidence under Kansas law, our holding is compelled all the more strongly because under Kansas law General Poly was obligated to prove the fiduciary relationship by clear and convincing evidence.

None of the evidence reviewed above indicates that Allied ever consciously assumed fiduciary duties as to General Poly. As discussed in section one, a showing that Allied consciously accepted fiduciary duties in the *sine qua non* of General Poly's claim. The duties of a fiduciary are serious and many, and an agreement to assume such duties will not be presumed. *See Denison State Bank v. Madeira*, 230 Kan. 684, 695-96, 640 P.2d 1235, 1243-44 (1982).

Relying on cases such as *Paul v. North*, 191 Kan. 163, 380 P.2d 421 (1963), and *Wolf v. Brungardt*, 215 Kan. 272, 284-85, 524 P.2d 726, 736 (1974), General Poly argues that the evidence at trial demonstrated that Allied and General Poly willingly and knowingly acted for one another's benefit "in a manner to impose mutual trust and confidence." *Wolf*, 215 Kan. at 284, 524 P.2d at 736. However, that argument ignores the central importance of the holding in *Denison*. Merely acting for one another's benefit will not give rise to fiduciary duties under Kansas law unless it is shown that the alleged fiduciary consciously assumed fiduciary responsibilities. Although the evidence at trial showed that Allied intended to act in a manner which would have consequential benefits for General Poly, nothing in the record suggests that any authorized representative of Allied ever intended to assume fiduciary duties on behalf of General Poly.

Neither the testimony of the Allied and General Poly representatives, their written correspondence and internal memoranda, nor the written agreement itself support General Poly's assertion that a fiduciary

relationship existed. Reviewing the evidence in a manner most favorable to General Poly, all that was shown was an arm's length commercial relationship. The General Poly representatives told Allied of their plans to enter the film market using HMW HDPE resin. The Allied representatives told the General Poly representatives of Allied's plans to develop and perfect such a resin. General Poly agreed to make available its extrusion equipment for Allied to test its product. In exchange, Allied agreed to sell its HMW resin, once developed, to General Poly on favorable credit terms with a first right to purchase a specified quantity. The two corporations agreed that all disclosures between themselves made during this one year period of "joint cooperation" would be protected by secrecy agreement binding for five years. Nothing in that course of conduct suggests that Allied ever intended to take on the many responsibilities of a fiduciary in its dealings with General Poly.

Allied was not shown to be acting "primarily for the benefit of" General Poly. To the contrary, it was openly and unabashedly developing its own capacity to produce HMW resin. *Denison*, 230 Kan. at 691-92, 640 P.2d 1241. Allied was not given and did not assume, any "influence over" General Poly other than the normal commercial arms length influence that suppliers and customers have over each other in the marketplace. *Id.* Allied did have superior knowledge of its own product and production capabilities, but that will be true of every supplier or potential supplier, and that is not sufficient to give rise to a fiduciary obligation. *Ritchie Enterprises v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1054 (D. Kan. 1990). None of General Poly's "property, interest or authority" was placed in charge of Allied. *Denison*, 230 Kan. at 691-92, 640 P.2d at 1241. The parties did place confidence in each other, but once again, that was a confidence based on commercial self-interest in which both parties had the power contractually to protect their own interests however they chose. Here, General Poly did not choose to obtain the contractual guarantees and rights that it now wishes it had. But, it can not imply fiduciary duties that were not clearly and convincingly assumed by Allied in order to cure its contractual deficiencies. *Wedman v. Home National Bank of Arkansas City*, No. 88-1439-K (D. Kan. Jan. 25, 1990) (WESTLAW,

1990 WL 7501) (J. Kelly) (citing *Denison* for the proposition that "when a person is competent and able to protect his own interests, he may not abandon all caution and responsibility for his own protection and unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the other party."); *Pizza Management, Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1184 (D. Kan. 1990) (J. Crow) (refusing to impose fiduciary duties on a franchiser under Kansas law: "In the setting of a commercial contract between two equally sophisticated business entities, this court is not prepared to impose heightened legal duties on one of the parties simply because that party may have more powers and discretion under the express terms of the agreement. Defendants are entitled to summary judgment on plaintiff's breach of fiduciary duty claims."); *Ritchie Enterprises v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1053-54 (D. Kan. 1990) (J. Crow) (refusing, under Kansas law, to find a fiduciary duty on behalf of a supplier of a computer system, even though the supplier has superior knowledge of his systems. "This court is unwilling to radically alter the given scheme of commercial dealings by the possible imposition of a fiduciary relationship upon a seller under these circumstances."); *LNS Investment Company, Inc. v. Phillips 66 Company*, No. 87-2215-0 (D. Kan. Aug. 29, 1989) (WESTLAW, 1989 WL 103637) (C. J. O'Connor) (refusing, under Kansas law, to imply a fiduciary relationship on a major purchaser of bottled motor oil who terminated a relationship with its supplier because of supplier's inability to provide the needed quantities of product.); *Adams Parker Furniture, Inc. v. Ethan Allen, Inc.*, No. 86-2113-5 (D. Kan. Oct. 13, 1987) (WESTLAW, 1987 WL 56676) (J. Saffels) (refusing, under Kansas law, to imply a fiduciary duty on a furniture manufacturer who terminated a distributorship even though the manufacturer had superior knowledge and power. "While [the manufacturer] certainly had a duty to meet any contractual obligations it owed to plaintiff, including a duty not to mislead plaintiff so it would detrimentally rely . . . it did not owe a duty to put [plaintiff's] interests before its own. It was not plaintiff's fiduciary, and therefore summary judgment . . . will be granted."). See also *Gillespie v. Seymour*, 796 P.2d 1060 (Kan. App. 1990).

The evidence upon which the district court relied in denying Allied's motion for judgment notwithstanding the verdict is similarly inadequate. There was testimony by Allied representatives that the relationship with General Poly was "unique." However, that characterization falls far short of demonstrating that Allied intended to increase its duties from those inherent in a commercial transaction to the level of those which are imposed in a fiduciary relationship. Likewise, the letter by Mr. Traver which the district court pointed to as evidence of the fiduciary relationship does no more than summarize the interactions of the two corporations, interactions which we find inadequate to show Allied consciously accepted fiduciary duties. Therefore, we reverse the district court's order denying Allied's motion for judgment notwithstanding the verdict and order that judgment be entered in favor of Allied on this claim.[5]

II. *The Fraud Claim Arising From The Peru Test*

On cross-appeal, General Poly challenges the district court's ruling directing a verdict in favor of Allied on General Poly's claim for fraud arising from the test of resin in Lima, Peru. At trial, General Poly alleged that allied knowingly misrepresented the resin sent to Peru in March 1979 as its own, when in fact the resin was made by Solvay and Allied was using it pursuant to a licensing agreement. In directing a verdict against General Poly, the district court ruled that General Poly had failed to show Allied made a knowing misrepresentation with the intent to deceive and, in the alternative, that General Poly's claim was barred by Kansas' two-year statute of limitations because the claim was brought more than two years after the alleged fraud should reasonably have been discovered. R. Vol. 50 at 5682-83. We affirm the district court's order directing a verdict in favor of Allied.

A. *The Law of Fraud in Kansas*

The law of fraud is well-established in Kansas:

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[5] Because of our holding with regard to Allied's motion for judgment notwithstanding the verdict, we need not reach the claim that the jury instructions on fiduciary duty were improper.

> Where one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially where the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expedience of the bargain.

*Wolf v. Brungardt*, 215 Kan. 272, 282, 524 P.2d 726, 734 (1974).

> "actionable fraud includes an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or recklessly made with a disregard for the truth, where another party justifiably relies on the statement and acts to his injury."

*K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1156 (10th Cir. 1985) (quoting *Lentz Plumbing Co. v. Fee*, 235 Kan. 266, 270, 679 P.2d 736, 742 (1984)).

An action for fraud must be brought within two years of when it accrues, "but the cause of action shall not be deemed to have accrued until the fraud is discovered." Kan. Stat. Ann. § 60-513(a)(3) (1983). The Supreme Court of Kansas has interpreted discovery of the fraud under the statute of limitations to mean

> the discovery by the person defrauded of such facts indicating he had been defrauded as would cause a reasonably prudent person to investigate, and which, if investigated with reasonably diligence, would lead to knowledge of the fraud.

*Wolf*, 215 Kan. at 281, 524 P.2d at 734. Because the "modern tendency is to restrict rather than to expand the immunity of one who gains an advantage over another by purposely misleading him," *id.*, "[s]ome Kansas cases have rejected statute of limitations contentions when the plaintiff could have discovered the fraud, but the defendant lulled the plaintiff into confidence that nothing was amiss." *Wolf v. Preferred Risk Life Ins. Co.*, 728 F.2d 1304, 1306 (10th Cir. 1984); *see, e.g.*,

*Augusta Bank & Trust v. Broomfield*, 231 Kan. 52, 61-62, 643 P.2d 100, 108 (1982).

B. *The Evidence of Fraud*

The district court's directed verdict may only be sustained if viewing "the evidence most favorably to the party against whom the motion is made, and giv[ing] that party the benefit of all inferences," there is no "evidence upon which the jury could properly find a verdict for that party." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir. 1984) (quotations omitted). In making that determination, we must take into account the burden of proof for the underlying claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). Under Kansas law, a claim of fraud "must be proven by clear and convincing evidence." *Nordstrom v. Miller*, 227 Kan. 59, 65, 605 P.2d 545, 552 (1980); *see Mackey v. Burke*, 751 F.2d 322, 328 (10th Cir. 1984). The district court's alternative ground for directing a verdict in favor of Allied was the Kansas two-year statute of limitations. Therefore, we must also take into account Allied's burden of proof for the affirmative defense of the statute of limitations.

> [A] directed verdict for the party having the burden of proof may be granted only where he has established his case by evidence that the jury would not be at liberty to disbelieve.

*Hurd*, 734 F.2d at 499.

The evidence introduced at trial of the parties' original discussions concerning the shipment of experimental HMW resins to Traver's PeruPlast plant in Lima, Peru are set forth in the first subsection discussing General Poly's claim for breach of fiduciary duty. In addition, the following evidence relating to Allied's allegedly fraudulent misrepresentations of the PeruPlast test and the subsequent events which Allied contends should have reasonably caused General Poly to discover the alleged misrepresentations forming the basis of its fraud claim was introduced at trial.

On October 28, 1978, Pat Snell added a handwritten note to a memorandum addressed to Singleton from Jecha in which he indicated that he had spoken with Traver about supplying a "developmental" resin. *See* Plaintiff's Ex. 99 (Addendum to Appellee's Br., Doc. 3). Snell further explained:

> (This of course would be the rebagged [Solvay] B5920F). The resin would be ideal.
>
> I've told George Jecha of my conversations and he's aware of all developments.
>
> This could be a great opportunity to test the BF920F, test an Allied version of the same, and make an entry into the HDPE film market in the U.S.

*Id.*; R. Vol. 20 at 1782.[6]

Pat Snell testified that in late January 1979, he contacted Traver's Houston office concerning the shipment of HMW resin to Traver's PeruPlast plant in Lima, Peru. *See* R. Vol. 20 at 1729. On February 16, 1979, Snell sent Traver a telegram requesting information on scheduling for the resin trials of the "new Allied resin." Plaintiff's Ex. S-114 (Addendum to Appellee's Br., Doc. 60). The shipping invoice which accompanied the five hundred and twenty-five pounds of resin shipped to Traver's PeruPlast plant indicated that the resin was "Paxon High Density Polyethylene." Plaintiff's Ex. S-116 (Addendum to Appellee's Br., Doc. 61). "Paxon" is a registered Allied trademark. *See* R. Vol. 20 at 1733.

The resin shipped by Allied was tested at the PeruPlast facility on March 26-27, 1979. The actual resin which was tested at the PeruPlast facility was not an Allied manufactured resin, but was instead Solvay B5920F purchased by Allied in Europe. *See* Plaintiff's Ex. 167 (Addendum to Appellee's Br., Doc. 9); Appellant's Br. at 7. The resin packaging did not identify it as a Solvay-manufactured resin because Allied had repackaged it in plain wrappers and placed an Allied

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[6] At trial Mr. Snell explained that B5920F is "a Solvay high molecular weight high density film resin made in Europe. B5920F is their commercial designation for it." R. Vol. 20 at 1730.

internal reference number on it. *See* R. Vol. 20 at 1735. On September 19, 1979, Snell sent Traver a letter with data from "our testing on the film made from Allied chemical's developmental resin 6-100 (7-392) at your plant in Lima, Peru." Plaintiff's Ex. 142 (Addendum to Appellee's Br., Doc. 14).

Hans Traver testified that General Poly's executives were unaware that the resin tested at the PeruPlast plant was manufactured by Solvay until discovery in this litigation commenced. R. Vol. 25 at 2262. However, Allied maintains that General Poly should have known by September 1979, that Allied was at that time not yet capable of manufacturing a satisfactory Hoescht-quality HMW resin.

Hans Traver testified that in August 1979, he and Pat Snell began to make arrangements for a test of Allied's resin (along with resins from other manufacturers) at an extrusion plant operated at Natick, Massachusetts, by Alpine (a Swiss company). R. Vol. 25 at 2266. A test was conducted at the Alpine plant on August 23, 1979. *Id.* at 2267. Two representatives of General Poly attended the test. *Id. at 2267-68.* In a memorandum drafted four days after the test, the two General Poly representatives stated:

> Began test on Allied Chemical HDPE # 6-412 97. Pat Snell of Allied Chemical was present and coordinated the test with Max Gmahle of Alpine. The HS65 extruder ran satisfactory but the test was a failure due to the melt instability of the test resin. Pat said that he would have to redesign the resin.

Plaintiff's Ex. 386 (Addendum to Appellant's Br., Doc. 12). Peter Barber, an extrusion supervisor for General Poly, testified that after the disappointing Alpine test, Pat Snell of Allied explained the adjustments that Allied needed to make in order to improve the resin. *See* R. Vol. 33 at 3365. Snell told Barber that he thought it was possible for Allied to make the necessary adjustments, although he did not say how much time would be required. *Id.*

In addition to the Alpine test, Allied points to the September 21, 1979 agreement's reference to a one-year development program as

proof that General Poly was aware Allied did not yet have a commercially viable HMW resin developed.

In February 1980, several Allied experimental HMW resins were tested using General Poly's extrusion equipment. R. Vol. 33 at 3366-69. According to Peter Barber, the Allied resins performed better than the resin tested at the Alpine plant in Massachusetts, but none were equal in quality to the industry standard Hoescht resin. *Id.* at 3369. Barber testified that Allied's Pat Snell told him Allied was "improving," getting "closer" and "near" to producing Hoescht-quality resin. *Id.* at 3369-70. Several other tests of Allied's resin samples were conducted at General Poly in 1980 and 1981, including a test on June 9, 1980 and one on September 18, 1980. *See* Appellee's Br. at 23, R. Vol. 33 at 3370, 3379.

General Poly placed its first orders for off-grade resin from Allied in June 1980. *See* Defendant's Ex. S-92 (Addendum to Appellant's Br., Doc. 83). A single rail car of resin mixed from several batches (the so-called "rainbow car") was shipped to General Poly by Allied and received by General Poly in July. R. Vol. 12 at 778-79. On July 7, 1980, General Poly received an invoice from Allied for resin shipped June 16, 1980, which identified the resin shipped as "Paxon Solvay Experimental PW" resin. *See id.* Subsequent shipments of off-grade resin ordered by General Poly from Allied were of inconsistent quality and had to be blended with Hoescht resin in order to be used effectively. R. Vol. 33 at 3237-39.

C. *The District Court's Ruling*

The district court directed a verdict in favor of Allied on General Poly's fraud claim stating that:

> Solvay product was an Allied developmental product as Allied saw it. They did so knowing it was not true, a test of *Nordstrom* [*v. Miller*, 227 Kan. 59, 65, 605 P.2d 545, 552 (1980)], is not shown, and they did so with an intent to deceive is not shown. I am convinced at this point in the case now, all parties rested, there is no showing nor evidence whatsoever that at any point in time Allied ever intended to deceive anyone. I make those findings as

> I would construe the relationship of the parties as prospective, probably buyer-sellers in the commercial context, that is, the traditional setting between the parties.
>
> Having said that, I needn't address the statute of limitation question, but it would appear to me that again in that setting, this event having occurred somewhere in March 1980 (sic), the parties were in concert with the reaching of some ultimate agreement. The parties were in communication from time to time. The awareness of the sate of affairs with regard to the resin was clearly known to representatives of General Poly before even the signing of the agreement, but surely the signing of the agreement itself puts in place the time frame for the statute to run. And if as of that moment General Poly at any time believed they had been misrepresented and that such misrepresentation was deceiving, they were duty bound to proceed. I am convinced as well then that the statute, even should this representation apply, has run.

R. Vol. 50 at 5682-83.[7] Although some evidence was introduced from which fraud could be inferred with regard to the Peru test, it is doubtful whether such evidence every approached a "clear and convincing" standard. The evidence of intent to defraud was only inferential at best and the evidence of falsity was ambiguous. Moreover, there was certainly evidence that Allied's labeling of the Solvay resin as its own

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[7] In an earlier statement made explaining that a ruling on the motion for a directed verdict on this claim would be taken under advisement the judge remarked,

> I have said in this case it struck me in either event, before this plant was opened, the plaintiffs were made aware that the Defendant was indeed not ready to deliver a product consistent with that which was shown to them or represented to them at Peru, and understanding this, I think I also said the statute of limitations probably has run, and certainly by the time they had signed off on the contract, even in the face of the misrepresentation, didn't the Plaintiffs know full well that whatever it was that was produced at Peru was not available for delivery then and hadn't the statute run.

R. Vol. 41 at 4590.

experimental resin was within its rights under its license with Solvay; that the relabeling was within normal practices to ensure blind testing; and that there was no intent to deceive. However, we do not base our affirmance on this ground. Rather, we affirm the court's ruling directing a verdict in favor of Allied because General Poly's claim is barred by the statute of limitations.

This alleged fraud took place in March 1979, when the rebagged Solvay resin was tested in Peru. The action for fraud was filed on August 17, 1982. R. Vol. 1, Doc. 1 at 20. Because the statute of limitations runs from the time when the fraud reasonably should have been discovered, the action would only be barred if discovery of the fraud should have reasonably occurred on or before August 16, 1980.

We believe that the disappointing results of the HMW resin tests conducted in August 1979, February 1980, and in June, 1980 "would cause a reasonably prudent person to investigate," and "if investigated with reasonable diligence, would lead to knowledge of the fraud." *Wolf*, 215 Kan. at 282, 524 P.2d at 734. The subsequent tests of Allied's samples inescapably put General Poly on notice that Allied was as yet incapable of reproducing the resin tested in Peru, and the entire course of conduct between the parties made it clear that, throughout that time period, Allied had not developed for commercial production any successful HMW resin. Yet, there is no evidence in the record indicating that General Poly's executives or engineers ever inquired as to the reason for that significant disparity.

This is not a case where the defendant "lulled the plaintiff into confidence that nothing was amiss" such that the failure to make inquiries is excusable. *Wolf v. Preferred Risk Life Ins. Co.*, 728 F.2d 1304, 1306 (10th Cir. 1984); *see, e.g., Augusta Bank & Trust v. Broomfield*, 231 Kan. 52, 61-62, 643 P.2d 100, 108 (1982). Various Allied representatives made statements which optimistically characterized Allied's progress in its efforts to develop a Hoescht-quality HMW resin. However, General Poly's attempt to portray those statements as false assurances justifying its inaction ignores the fact that General Poly had knowledge of Allied's actual progress by virtue of the test results of Allied's resins. Therefore, this case is distinguishable

from cases such as *Dreiling v. Home State Life Ins.Co.*, 213 Kan. 137, 145-46, 515 P.2d 757, 765 (1973), and *Augusta Bank & Trust*, 231 Kan. at 61-62, 643 P.2d at 108, where the fraud went undetected because the defendant made affirmative misrepresentations such that the plaintiff had no independent reason to make further inquiries.

General Poly contends that even though it made no inquiries into the reason for the inconsistent test results obtained from Allied's resin samples, Allied is unable to satisfy its burden of showing that no reasonable jury could conclude that General Poly did not learn of the allegedly fraudulent acts prior to August 1980. *See Wolf*, 728 F.2d at 1306-07 (in an action for fraudulent representations concerning the coverage of an insurance contract a material factual dispute existed as to whether the fraud was discovered when plaintiff actually learned of the misrepresentations or when the plaintiff reasonably should have discovered the disparity in coverage). General Poly argues that because there is no evidence in the record indicating that Allied would have disclosed that the HMW resin tested in Peru was manufactured by Solvay if General Poly had inquired, discoverability may not be presumed.

In *Waite v. Adler*, 239 Kan. 1, 6-7, 716 P.2d 524, 528 (1986), the Supreme Court of Kansas recognized that in certain circumstances knowledge of allegedly fraudulent acts may be presumed. In *Waite*, as action was brought against a bank officer for making allegedly fraudulent statements about the credit standing of an automobile dealership in which the plaintiff then invested. *Id.* at 1-3, 716 P.2d at 524-25. Although the jury returned a verdict for the plaintiff, the court reversed based on the statute of limitations. The court held that the plaintiff should have known of the dealership's precarious financial situation when, more than two years before the action was commenced, the bank took possession of the dealership inventory. *Id.* at 7, 716 P.2d at 528. Although the repossession of cars did not directly establish the falsity of the earlier statements made by the bank, the court concluded that the earlier statements all went to the general subject of the creditworthiness of the dealership and tended falsely to misrepresent such creditworthiness. The subsequent foreclosure put the plaintiff on notice that the general creditworthiness was not as implied by the

earlier statements and, consequently, imposed upon him a duty to investigate the truth of the earlier statements.

In this case, General Poly could not have helped but know by August 1980 that Allied was not able consistently to produce or even to reproduce for an isolated test high-grade resin such as that used in the Peru test. Viewing the evidence presented in the light most favorable to General Poly, we hold that no reasonable jury could have properly found that prior to August 1980, General Poly was without knowledge of Allied's inability to produce resin of the quality of that tested in Peru on an ongoing basis. Because General Poly's action for fraud was based entirely on Allied's alleged fraudulent concealment of that information, we affirm the district court's ruling directing a verdict in favor of Allied based on the statute of limitations.

III. *The Fraud Claim Arising From the Rail Car Exchange*

General Poly also appeals the district court's ruling directing a verdict in favor of Allied on a separate claim of fraud. Essentially, General Poly alleged that Allied defrauded General Poly by taking return of two rail cars of off-grade resin which General Poly had pledged as collateral and then reneging on its commitment to replace the cars with two cars of premium grade (or at least better grade) resin before the time General Poly was obligated to report the status of its collateral to the bank. In analyzing General Poly's cross-appeal of the directed verdict on this claim, we apply the principles of Kansas' law of fraud and the standards for reviewing a directed verdict set forth in the previous subsection.

A. *The Evidence Presented*

According to General Poly, the following evidence presented at trial was sufficiently clear and convincing such that a reasonable jury could have properly ruled that Allied acted fraudulently. On June 3, 1981, Allied's George Jecha and Kurby E. Wiley met with General Poly's Traver and Walker at the General Poly plant. *See* R. Vol. 27 at 2442; R. Vol. 29 at 2642. Wiley asked Traver's opinion of a batch of new Allied resin which had been tested at General Poly the month before. R. Vol. 27 at 2442-43. Traver testified that when he expressed

his satisfaction with that resin, Wiley asked "[h]ow would you like it if we would exchange those three hopper cars that you have sitting out there on your spur for this new material?" *Id.* at 2443. Traver agreed, remarking "[l]et's do it." *Id.* Traver testified that another General Poly employee informed him that one rail car had been partially used and suggested that only the two unopened cars be returned. *Id.* at 2444. Traver testified that Walker told the Allied representatives that those cars were pledged as collateral and that any exchange would need to be completed before the end of the month and that Wiley responded by stating "[w]e can do that." *Id.* Traver further testified that Wiley said "[l]et's exchange the cars. We will take them back and we'll send you new material." *Id.* at 2445.

Traver testified that he then dictated a memorandum in the presence of Wiley and Jecha. *Id.* That memorandum provides, in relevant part, as follows:

> 1. General Poly is to return hopper cars #GCX0945258 and #GCX0945205, for a credit of $129,701. This credit is to be applied against the *oldest outstanding invoices*. The remaining debt payable will be between $170,000 and $180,000, none of which is due at this time.
>
> . . . .
>
> 2. Allied will replace the two cars with two cars of the run 13103 and/or 154008, ETA June 22 to June 30 at IAK, *at the same price* as the two wide spec [(i.e., offgrade)] cars returned to Allied.

Plaintiff's Ex. 1545, Addendum to Appellee's Br., Doc. 34 (emphasis added). However, Traver testified that Wiley had indicated he would have to secure his superiors' approval of both the price of the new resin and the particular invoices to be credited for the returned cars. R. Vol. 29 at 2644-45. On June 11, 1981, Traver wrote a letter seeking to confirm the agreement to Allied's Wiley, Heath and Jecha. *See* Plaintiff's Ex. 1561, Addendum to Appellant's Br., Doc. 31. R. Vol. 29 at 2649-52. That letter provides, in pertinent part, as follows:

Dear George:

This is to confirm our conversations when you visited our offices last week. You will take back hopper cars GCX945258 and GCX945205, invoices 0944-6198 and 0944-7210 for $61,916.40 and $64,216.80. You will issue us corresponding credit memos, which we can apply to future purchases.

I will issue to you a purchase order for the new material of the runs tested last month, and we shall specify on the order the arrival. At least one hopper car should be here by June 30.

Plaintiff's Ex. 1561, Addendum to Appellant's Br., Doc. 31. Sometime after June 11, 1981, Allied's Kurby Wiley spoke with Traver by telephone and advised him that the resin tested at General Poly in June was not available for shipment to General Poly. On June 25, 1981, Traver wrote George Jecha the following letter:

Dear George:

Shortly after you left, we received a phone call from Kurby, who advised me as follows:

1.) The material which we tested here in our plant and liked very much, namely lot #103[8] and lot #154008, were never available in hopper car quantities.

2.) At this time, there is only one hopper car of prime material, impact strength 320, which would not meet our needs, in any event costing 48¢.

3.) There was a hopper car available with an impact strength of 260, classified as off-grade at 38¢. This is the material for which we have placed purchase order #670, and for ease of identification we designated the resin as 4100-260.

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[8] Apparently, this is either a typographical error or a shorthand reference to lot # 13103.

Kurby further explained that with the current impact test, those lots with an impact strength of 380-420 were considered prime, but that no such resin was available in hopper cars at that time. I am still not quite sure what constitutes prime, but we will proceed on the assumption that prime signifies a dart impact of 380-420 grams, with the exception of the above mentioned hopper car with an impact strength of 320.

Kurby also explained that you expect to make a new run in July.

In view of the above, I see the situation like this:

1.) At this time, Allied has no prime resin with the properties we are looking for.

2.) We are again placing an order for splity (sic) resin, which we will need to blend off with a competitive material.

3.) We need to wait til (sic) after the July run to know what resin properties we can expect from Allied.

4.) Your price for prime, when available, will be 48¢.

Plaintiff's Ex. 1586, Addendum to Appellant's Br., Doc. 32.

Allied's Paul Heath testified that although Wiley informed him that General Poly's representatives had said the two cars being returned were pledged as collateral, he did not believe that General Poly could have pledged assets not yet paid for as collateral. R. Vol. 31 at 2934. Heath further testified that prior to the time the two rail cars were picked up from General Poly it had already been decided that they would not be replaced. *Id.* at 2938. The two rail cars of resin were picked up at General Poly's facility on June 18, 1981 and June 26, 1981. R. Vol. 29 at 2678. No replacement cars were ever delivered to General Poly from Allied. R. Vol. 27 at 2451.

Timothy Stanton, who served as an officer of the Commerce Bank in 1981, testified that when Traver told him of the two cars of resin which had been returned to Allied and not replaced, the bank informed

General Poly that it would extend the corporation no further credit and that receivables deposited at the bank would be marshalled in part for the payment of outstanding indebtedness. R. Vol. 35 at 3600, 3620-21.

B. *The Law Regarding Fraudulent Statements of Intent to Act in the Future*

This court has previously recognized that

> [u]nder Kansas law, "[w]hen alleged fraud relates to promises or statements concerning future events, the gravamen of such a claim is not the breach of the agreement to perform, but the fraudulent representation concerning a present, existing intention to perform, when such intention is in fact nonexistent."

*Mackey v. Burke*, 751 F.2d 322, 328 (10th Cir. 1984) (quoting *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, 78, 596 P.2d 816, 824 (1979)). In *Mackey*, the plaintiff sold the defendants a number of Holstein heifers, many of which the defendants later learned were too ill to be exported to Korea when they attempted to ship them from Seattle, Washington. *Mackey*, 751 F.2d 324. The defendants stopped payment on the check to the plaintiff, and the plaintiff called the Seattle Port Authority to prevent shipment of the cows. However, one of the defendants later persuaded the plaintiff to allow the shipment by promising to return to Kansas and straighten everything out. The defendant never returned to Kansas as promised. Applying *Modern Air Conditioning*, the court in *Mackey* held that the "plaintiffs failed to present any clear evidence at trial that [the defendant] did not intend to return to [Kansas] at the time that he made the promise." *Id.* at 328. Thus, the punitive damage award based on fraud was reversed. *Id.* at 328-329.

In this case, the district judge entered a directed verdict against General Poly on its fraud claim without specifying the basis of his ruling. The court simply stated, "I see no basis for fraudulent misrepresentation." R. Vol. 41 at 4596. When defendant's counsel inquired further as to the court's ruling on "the hopper car replacement

issue," the court answered, "I don't see that as fraudulent misrepresentation" and proceeded to direct a verdict in favor of Allied. *Id.* at 4597. Although the district court did not elaborate on its analysis, we hold that the court reached the correct conclusion.

General Poly asserts that on June 3, 1981, Allied's Wiley had no present intention to effect a swap when he proposed an exchange of off-grade rail cars for rail cars containing resin equivalent to that tested in the May test. However, even viewing the record in the light most favorable to General Poly, we find only a single piece of evidence which even arguably supports that conclusion—the statement by Hans Traver in his July 25, 1981, letter to George Jecha that Wiley had informed him that "[t]he material which we tested here in our plant and liked very much, namely lot #103 and lot #154008, were never available in hopper car quantities." Plaintiff's Ex. 1586, Addendum to Appellant's Br., Doc. 32. General Poly is unable to point to *any* evidence whatsoever in the record which would suggest that Wiley knew the promised upgraded resin was unavailable at the time he made the offer to exchange. The testimony that Allied's Heath had decided not to replace the two cars prior to the time they were picked up is unavailing because there was no evidence suggesting that Heath communicated that intent to Wiley before Wiley made representations concerning the exchange to the General Poly representatives. Furthermore, Heath only testified that he had decided not to provide replacement cars prior to the time the two off-grade railcars *were picked up*. Nothing in his testimony suggests that he or anyone else at Allied had formulated such an intent as of the earlier time when Wiley told Traver that replacement cars would be shipped. Therefore, because General Poly presented no evidence, much less clear and convincing evidence, indicating that at the time Wiley suggested the exchange to General Poly he did not intend to carry through with his proposal, we affirm the district court's ruling entering a directed verdict in favor of Allied.

IV. *The Conversion Claim Arising From The Rail Car Exchange*

General Poly brought a separate claim against Allied for conversion based on Allied's allegedly wrongful appropriation of the two rail cars

of off-grade resin which were returned. The district court directed a verdict in favor of Allied on this claim without any explanation of the basis for the ruling. *See* R. Vol. 41 at 4596.

In Kansas, as elsewhere, conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another" resulting in some "actual interference with" the rightful owner's possession of property. *Desbien v. Penokee Farmers Union Coop. Assoc.*, 220 Kan. 358, 365, 368, 552 P.2d 917, 924, 926 (1976). However, as General Poly concedes, there is undisputed evidence that General Poly's representatives consented to Allied's acquisition of the two cars. Although generally "[o]ne who would otherwise be liable to another for . . . conversion is not liable to the extent that the other has effectively consented to the interference with his rights," *Restatement (Second) of Torts* § 252 (1965), it is well-established that "[c]onsent to possession of a chattel obtained by fraud or duress is not effective to prevent recovery . . . for conversion." *Id.* at § 252A.

General Poly argues that the Allied representatives fraudulently induced General Poly's consent to the return of the two rail cars. However, as discussed above, General Poly did not present sufficient evidence to withstand Allied's motion for a directed verdict on the fraud claim. Consequently, General Poly's assertion of fraudulently induced consent must likewise fail.[9]

## V. *The Contract Claims*

### A. *Breach of the Written Agreement*

General Poly's next argument on appeal is that the district court improperly directed a verdict in favor of Allied on General Poly's claim for breach of their written agreement. In directing a verdict in favor of Allied, the district court explained his reasoning as follows:

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[9] Although it is not essential to our holding, we note that even if General Poly were able to establish fraud so as to invalidate its consent to return of the first car, Traver's letter of June 25, 1981, evidences his actual knowledge that Allied lacked prime resin such that consent to removal of the rail car picked up the very next day could not have been fraudulently obtained.

> [A]s I listened to Plaintiffs' evidence, it seemed clear to me that if it was a claim for breach of contract, it was in part because the Plaintiffs had ordered and reordered time and again certain off-weight resins from Allied, received them, knowing they were off-weight, accepted them as off-weight, used them without any remonstration or complaint or attempts to set aside the terms of the agreement or to claim that the terms had been breached. I have always then been persuaded, if this case is premised in its commercial setting, that the provisions of Section 2-606 through 608 probably control this case, and as a consequence, Plaintiffs had no breach of contract.

R. Vol. 41 at 4587-88.

General Poly argues that the district court's ruling was erroneous because "[t]here was unequivocal evidence that Allied had commercial quantities of prime resin available in May-June 1981, which it sold to others before offering [it] to General Poly.... That conduct directly breached the written 'first right to purchase' term of [the written agreement]." *See* Appellee's Br. at 86.[10] The first right of purchase provision provides as follows:

> 1.2 For a period commencing with the production by Allied Chemical of a semi-commercial or commercial scale of any new high density polyethylene film grade resin developed and terminating three (3) years thereafter, it is agreed that General Poly

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[10] Allied maintains that General Poly has waived this argument. *See* Reply/Answer Brief of Appellant at 65-66. However, in denying Allied's motion for summary judgment on the claims for breach of the written agreement, the district court stated that "plaintiff claims the first right to purchase provision in the September 21 agreement was breached by Allied when it 'withheld resin ... suitable for General Poly for months, while attempting to move such resin to General Poly's competitors.' " *Rajala v. Allied Corp.*, 66 B.R. 582, 597 (D. Kan. 1986) (quoting Pretrial Order at 5). Thus, it is clear that the claim for breach of the first right of purchase provision was raised below and has not been waived on appeal. Nevertheless, we affirm on the ground that General Poly failed to present sufficient evidence of breach to withstand Allied's motion for a directed verdict.

> shall have the first right to purchase such high density polyethylene film grade resin from Allied Chemical up to a maximum of 500,000 pounds per month. General Poly's first right to purchase film grade pursuant to this Section 1.2, however, shall be contingent upon General Poly giving Allied Chemical at least thirty (30) days' prior written notice of its requirements for each calendar month in which General Poly chooses to exercise its first right to purchase. With respect to each calendar month for which Allied Chemical receives no written timely notice, as provided for herein, Allied Chemical shall be relieved of any obligation to General Poly.

Plaintiff's Ex. 420, First Addendum to Appellant's Br., Doc. 14. Because the written agreement states that it "shall be governed by and construed in accordance with the internal laws of the State of New York without regard to conflict of laws," we must apply the law of New York. *Id.*

1. *Sufficiency of the Evidence of Breach*

We believe the district court correctly entered its ruling directing a verdict in favor of Allied. The district court based its conclusion on Sections 2-606 through 608 of the Uniform Commercial Code ("U.C.C."), and we believe those provisions establish that General Poly has no breach of contract claim for the off-grade resin that was delivered to it and accepted by it under the contract. With regard to the claim that Allied was delivering prime grade resin to General Poly without making such resin available to General Poly, in May and June, 1981, we observe that the terms of the written agreement specify that unless General Poly gives Allied thirty days *written* notice of its needs for the calendar month, no first right of purchase shall inure for that month. We hold that General Poly's failure to supply such notice precludes General Poly from asserting this breach of the agreement.

General Poly first argues that it was not required to give Allied written notice of its resin needs because Allied failed to notify General Poly of the available resins. In the alternative, General Poly suggests that its communications with Allied did constitute notice so as to

satisfy its obligations under the written agreement. However, the record does not support either of those arguments.

General Poly contends that it was not obligated to give Allied written notice until such time as Allied first notified General Poly that resin was available. This position is untenable for two reasons. First, it is clear from the record that the AFK-9 PAXSON 4100 resin which General Poly complains was sold to other companies in breach of the agreement was first tested at the General Poly facility. Although General Poly evidently was not satisfied with the quality of the resin from that run, it cannot now argue that it did not have notice of its existence. Second, even if the record were otherwise, we are unwilling to read into the written agreement an obligation on the part of Allied to notify General Poly of the availability of prime resin, because no such provision appears in the clear and unambiguous language of the agreement. *See Meccico v. Meccico*, 559 N.Y.S.2d 974, 76 N.Y.2d 822, 559 N.E.2d 668 (1990) ("Where the contract is clear and unambiguous on its face, the courts must determine the intent of the parties from within the four corners of the instrument."); *cf. Remetich v. Remetich*, 110 A.D.2d 760, 488 N.Y.S.2d 49 (1985) (plaintiff failed to exercise an option to purchase "in the clear and explicit manner stated in the separation agreement").

General Poly argues in the alternative that it did in fact notify Allied of its resin needs. However, General Poly does not call our attention to any evidence in the record suggesting that it gave Allied any kind of written notice for either of the months for which it now alleges breach (i.e., May and June 1981). The three exhibits which General Poly cites are unavailing. The first letter General Poly relies on is a letter from Traver to Heath written on September 19, 1980. Plaintiff's Ex. 1088, First Addendum to Appellee's Br., Doc. 20. The letter indicates that General Poly would be willing to purchase "[t]he two hopper cars which you have available" and requests a meeting to "work out with you a purchasing program for 1981." *Id.* The second exhibit General Poly relies on is an order for seven hopper cars of offgrade resin to be blended with Hoescht resin. Plaintiff's Ex. 1276, First Addendum to Appellant's Br., Doc. 24. The proposed shipping

dates for those cars are listed as between February 9, 1981, and April 24, 1981. *Id.* The final exhibit referenced by General Poly is Traver's June 2, 1981 letter in which he inquired as to the availability of the resins which he found to be satisfactory but which contains no written statement of General Poly's requirements nor does it contain an order for material. Plaintiff's Ex. 1544, First Addendum to Appellee's Br., Doc. 33. None of these documents shows that General Poly ever gave Allied written notice of its resin needs for the months of the alleged breach—May and June 1981. "It is a basic tenet of contract law that before liability can arise on a promise qualified by conditions expressed or implied in fact, such conditions must be fulfilled." *Morse v. Ted Cadillac, Inc.*, 146 A.D.2d 756, 756, 537 N.Y.S.2d 239, 240 (N.Y. App. Div. 1989) (quotations omitted). Because sufficient evidence was not presented such that a reasonable jury could properly have found that General Poly had fulfilled its notice obligations under the agreement, we hold that the district court properly directed a verdict in favor of Allied on General Poly's action for breach of the written agreement.

B. *Breach of the Oral Contract*

The last of General Poly's arguments which we address is that the district court incorrectly directed a verdict in favor of Allied on the claim for breach of oral agreements. General Poly alleges that Allied and General Poly entered into an oral agreement whereby "Allied would: (i) deliver an HMW resin by the end of 1979; (ii) develop a Hoescht-quality resin by that time; (iii) sell the new resin to General Poly on 90-day credit terms; and (iv) sell it to General Poly for one to two cents over the price of injection molding." Appellee's Br. at 86. According to General Poly, Allied breached these agreements because "the prime resin was not ready for delivery by the end of 1979, Hoescht-quality was not reached until May 1981, and then Allied cut off all credit." *Id.*

The text of the district court's ruling is set forth in the previous subsection. The district court concluded that because General Poly accepted the off-grade resin without notifying Allied that it considered delivery of such goods to constitute breach, General Poly's claim for

breach of the oral agreement was barred under sections 2-606 through 2-608 of the U.C.C. In addition, the district court stated,

> As to the oral contract, which is suggested here as terms reached in January of '79, and which go hand in glove with the written agreement, I have also said in this case, again in the commercial setting, that there is no showing here that Defendants, through their representatives, have accepted them, particularly that portion which would address price or time of delivery. Simply said: there has been no meeting of minds shown.

R. Vol. 41 at 4588.

General Poly argues that the following evidence presented at trial constituted "direct evidence" of Allied's agreement to the terms of the oral contract. According to the testimony of General Poly's Hans Traver, Allied's Bonin stated that the ninety-day credit terms were deliberately omitted from the secrecy agreement to avoid the risk of other Allied customers discovering General Poly's favorable relationship with Allied. R. Vol. 11 at 664. On January 11, 1979, Allied's Bonin drafted a file memorandum in which he wrote that the General Poly representatives "indicated they would buy at least 50% and possibly all their resin requirements from Allied if we have a satisfactory product when they start up in October 1979." Plaintiff's Ex. 129 (First Addendum to Appellee's Br., Doc. 6 at 2). On January 23, W. P. Prince, a technical manager at Allied, wrote an Allied internal memorandum in which he stated "General Poly has agreed to work with us in developing HDPE film resins. Indications are that we can obtain 50% of their business if we have a suitable material by the time they start up in late 1979." Plaintiff's Ex. 138, Addendum to Appellee's Br., Doc. 9; *see* R. Vol. 11 at 650 (testimony of Hans Traver); R. Vol. 24 at 2231-32 (same). Finally, a promotional article approved by Allied's Paul Heath claimed that "General Poly received a promise from Allied Chemical that a domestic supply of HMW HDPE would be available by the time the company began operation." Plaintiff's Ex. 1364, Addendum to Appellee's Br., Doc. 28: *see* R. Vol. 31 at 2981 (testimony of Paul Heath).

This evidence is not sufficient to establish specific terms of an oral argument, particularly with regard to price, terms of delivery, quality, and quantity, such that a jury could conclude that the parties had a meeting of the minds on an oral agreement. Further, the oral agreement that General Poly now asserts is contrary to the written agreement and the conduct of the parties. In addition, the district court's ruling may be affirmed because General Poly accepted the off-grade resin without notifying Allied that delivery of the nonconforming goods constituted a breach.

The district court determined that General Poly "ordered and reordered time and again certain off-weight resins from Allied, received them, knowing they were off-weight, accepted them as off-weight, used them without any remonstration or complaint or attempts to set aside the terms of the agreement or to claim that the terms had been breached." R. Vol. 41 at 4587-88. The court concluded that such conduct barred General Poly's action for breach of the oral contract under U.C.C. provisions §§ 2-606, 2-607 and 2-608.

The U.C.C., as incorporated by Kansas,[11] provides:

> Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or *be barred from any remedy*.

Kan. Stat. Ann. § 84-2-607(3)(a) (1983) (emphasis added). As the district court noted, General Poly repeatedly ordered the off-grade resin from Allied without ever suggesting that the failure to deliver

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[11] As discussed above, the written agreement contains a choice of law provision stipulating that the law of New York shall govern all disputes. In denying Allied's motion for summary judgment on the oral contract claim, the district court applied New York law in deciding the parole evidence questions. *See Rajala v. Allied Corp.*, 66 B.R. 582, 589-598 (1986). However, on appeal neither party has suggested that New York's law controls the independent oral contract claim. Rather, both parties have cited with approval the provisions of the U.C.C. incorporated in the Kansas statutes. *See* Appellant's Reply Br. at 67 n. 104; Appellee's Br. at 87, n. 80. In any event, because the relevant provisions of the U.C.C. under the New York Statutes are identical to those of Kansas, we need not decide the choice-of-law question. *See* N.Y. *U.C.C. Law* §§ 2-607, 2-712 (Consol. 1990).

prime resin on favorable terms by the fall of 1979 breached the oral agreements. General Poly is unable to direct our attention to any evidence in the record demonstrating that it notified Allied that it regarded delivery of the off-grade resin to constitute a breach. Instead, General Poly argues that its acceptance of the off-grade resin was "cover" under Kan. Stat. Ann. § 84-2-712(1) (1983).

Although a buyer may obtain cover from the breaching seller, that in no way removes the buyer's obligation to notify the seller of the alleged breach after a tender under Section 2-607(3)(a). Moreover, Section 2-712(1) states that a buyer may seek cover only after a breach under Section 2-711. A breach within Section 2-711 only occurs where "the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance." Kan. Stat. Ann. § 84-2-711(1) (1983). General Poly is unable to point to evidence in the record upon which a reasonable jury could properly find that it rejected the off-grade resin tendered by Allied because it was in violation of the asserted oral contract or otherwise notified Allied that it regarded delivery of such goods as a breach of the asserted oral contract. For all these reasons, we affirm the district court's ruling directing a verdict in favor of Allied on this claim.

## SUMMARY AND CONCLUSION

We REVERSE the judgment in favor of General Poly on the claim for breach of fiduciary duty. We AFFIRM the district court's ruling directing a verdict in favor of Allied on General Poly's claim for fraud. We AFFIRM the directed verdict on the conversion claim. We AFFIRM the district court's ruling directing a verdict in favor of Allied on General Poly's claim for breach of the written agreement. Finally, we AFFIRM the directed verdict on the oral contract claim. We do not reach any of the other issues raised by the parties because the foregoing rulings and the subsidiary rulings contained therein are dispositive of these appeals. Accordingly, the case is REMANDED to the district court with orders that judgment be entered consistent with this opinion.

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 82-2282-K

ERIC C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation,
Plaintiff,

vs.

ALLIED CORPORATION,
Defendant.

### MEMORANDUM AND ORDER

This case was brought by Eric C. Rajala, trustee in bankruptcy for General Poly Corporation, a Kansas corporation. For purposes here, plaintiff will be referred to as General Poly. Its principals include Hans Traver, a widely renowned plastic manufacturer currently operating a large high density plastic film plant in Lima, Peru; C.A. "Bud" Walker, a successful entrepreneur with experience in the plastic business; and Ed Podolak, a well-known and well-regarded former Kansas City Chiefs football player.

Essentially, it is claimed that General Poly sustained damages and was forced to resort to bankruptcy due to the fault of defendant Allied Corporation. Plaintiff's claims rest on several legal theories, collectively and/or alternatively, including breach of contract, written and oral, fraud, and/or breach of fiduciary relationship.

Plaintiff contends that in January of 1979 the principals met with representatives of Allied and reached certain agreements regarding the joint development of prime, high molecular weight, high density polyethylene (HMW-HDPE) film grade resin. It is claimed that the parties agreed that General Poly would allow Allied to test resins on its state of the art extrusion equipment with the aid of trained personnel, and Allied, in turn, would develop a "prime resin as good as Hoechst" (the industry standard), which would be sold to General Poly at two

cents per pounds above the price for injection molding grade resin, and would be available by the time General Poly began operations in late 1979. Following this meeting, the plaintiff contends that the parties began to exchange information regarding the development efforts, and that each exchange of information was made with expectation of secrecy and confidentiality. Plaintiff claims that on September 21, 1979, the parties signed a written agreement which memorialized or formalized the joint development effort which had begun in January of 1979. It is claimed here that the parties' oral agreements were included even though not specified in the written agreement. This agreement included a provision that General Poly would have the first right to purchase the HDPE film grade resins produced by Allied. Defendant's breach of this agreement, by failing to timely or adequately supply General Poly with prime resin, gave rise to the collapse of General Poly.

Plaintiff further contends that during the discussion between the parties in January, 1979, Allied represented it was already at work on developing an HMW-HDPE resin, and that it possessed the necessary catalysts. Plaintiff contends that Allied expressed its wish to test its experimental resin on Traver's extrusion equipment in Peru. It claims that in March, 1979, Allied sent bags of resin identified as Allied's PAXON HDPE to the Peruplast Plant. It claims that the resin sent to Peru was, in fact, the commercial resin made by Solvay et cie Belgium, which Allied had purchased and *rebagged* in its own bags. Plaintiff claims Allied, in fact, had no developmental resin of its own and that Allied concealed the true identity of the Solvay resin in order to induce plaintiff to go into business. It is claimed that on the strength of the Peru test results the principals were led to believe that Allied was ready to produce a commercial prime resin similar to that tested in Peru. Plaintiff allegedly relied on this and proceeded with investments and corporate undertakings. General Poly contends that had it known the real situation, the investors would not have participated and General Poly would never have been formed.

Plaintiff further contends that Allied had prime HMW-HDPE film grade resin available for sale in commercial quantities in May and June of 1981, and that General Poly indicated its desire to purchase such

prime resin from Allied and attempted to do so through an exchang of two rail cars of wide-spec resin for two rail cars of prime material In contends that although Allied had proposed the exchange, an General Poly returned the off-spec rail cars, which Allied knew wer subject to a bank security interest, Allied failed to replace them wit prime resin. It is claimed that Allied never intended to complete thi exchange and such representations constituted additional fraud.

Upon completion and close of the plaintiff's evidence, I directed a verdict in favor of defendant on each of defendant's theories as previously set forth. Briefly, I found then that under the laws governing transactions between parties in the usual commercial setting — by that I mean, parties dealing at arm's length or acting in their own self interest, in a traditional business setting — no enforceable contract was formed in January, 1979, and that plaintiff had waived any right to assert a breach of written contract, given certain defenses under the Uniform Commercial Code, and that defendant did not intentionally defraud the plaintiff regarding the Peru test or the rail car exchange.

However, as indicated, the plaintiff alternatively claimed and proceeded here on the theories that the parties were not acting in the usual commercial setting or dealing at arm's length, but were, due to the unique nature of the undertaking, acting as fiduciaries — each party reposing confidence and trust in the other for the benefit of their mutual development efforts and goals, which gave rise to a duty on the part of each to act in good faith, complete candor, and fairness to the other. In this regard, plaintiff claims this relationship was formed in late January, 1979, when the parties began pursuing their joint development efforts in confidence and secrecy. It contends here that the written contract signed in September of 1979 merely memorialized the parties' agreement to jointly develop resin and maintain secrecy, but that this did not change the nature of the parties' fiduciary relationship.

Further, plaintiff contends that due to the existence of this special relationship, Allied had a duty to reveal the true source of the resin tested in Peru in March, 1979, and that it relied on Allied to communicate the true state of facts, and Allied's failure to do so amounted to

constructive fraud. Plaintiff further contends that it agreed, as part of the parties' joint development effort, to purchase and use Allied's wide-spec or off-grade HMW-HDPE resin during the course of its experimental development period in order to assist and accommodate Allied, as well as to use the resin for blending with Hoechst HMW-HDPE film grade resin in order to make saleable products. It contends that its use of Allied's off-grade resin caused production and sale difficulties resulting in substantial cash losses. It claims that when, in May of 1981, Allied was finally successful in developing a prime HMW-HDPE film grade resin, after many months of development efforts in which General Poly had assisted, and during which time General Poly suffered a severe cash flow problem due to its inability to purchase prime resin from Allied, and due to its use of Allied's off-grade resin, Allied had a duty as a fiduciary to reasonably accommodate General Poly in its efforts to purchase the newly developed prime resin and to deal fairly and in good faith. It claims that Allied breached this duty when it encouraged General Poly to return the two rail cars of wide-spec resin and failed to replace them with two new cars of prime resin, withdrew all credit terms, demanded immediate repayment of all outstanding debts, and required that any further purchase be paid in advance. Plaintiff contends that as a foreseeable consequence of defendant's actions, General Poly failed financially because of the destruction of confidence of its principal bank, depletion of working capital, and the unanticipated removal of Allied as a principal source of new material. It claims, of course, that these damages were foreseeable and directly resulted in Allied's breach of fiduciary duties, which included all of the debts that General Poly owes in bankruptcy to its creditors, the interest accruing on those debts, the equity investment which the shareholder made in the company, and the lost profits the company would have been able to earn during the three years beginning in July, 1981, and ending in July, 1984, during which period General Poly would have been able to purchase 500,000 pounds per month of prime HMW-HDPE resin from Allied under the written joint development agreement.

A jury trial of this most provocative and complex case extended over approximately three months. Following an additional two weeks

of jury deliberation, the jury unanimously returned the following verdict:

> We, the jury, being duly and properly impaneled, submit the following answers to the questions propounded by the court:
>
> 1. Was the relationship between plaintiff General Poly and defendant Allied Corporation fiduciary in nature?
>
> Yes X ___
>
> [If you answer "no" to No. 1, do not answer the remaining questions — sign and return this verdict form. If you answer "yes" to No. 1, please continue to the next question.]
>
> 2. Did defendant Allied Corporation, at any time, breach its fiduciary duty owed to General Poly?
>
> Yes X ___
>
> [If you answer "no["] to No. 2, do not answer the remaining questions — sign and return this verdict form. If you answer "yes" to No. 2, please continue to the next question.]
>
> 3. Was defendant Allied's breach of its fiduciary duty a substantial contributing factor to the financial collapse of General Poly?
>
> Yes X ___
>
> [If you answer "no" to No. 3, do not answer the remaining questions — sign and return this verdict form. If you answer "yes" to No. 3, please continue to the next question.]
>
> 4. If you have found that Allied breached its fiduciary duty and that such breach was a substantial contributing factor to General Poly's collapse, please state the amount of damages which you have determined will compensate General Poly.
>
> $ 10,335,810.10

5. If you awarded damages in No. 4 above, do you assess punitive damages?

Yes X ___

6. If you answered "yes" to No. 5, please state the amount of punitive damages to be awarded.

$ 60,000,000.00

7-2-87
Date

Willis Arthur King
Foreperson

Now the defendant has filed a motion for judgment notwithstanding the verdict and a motion for new trial. The motion spans 97 pages, 15 grounds alleged for judgment notwithstanding the verdict, and 92 paragraphs alleged in the motion for new trial, comprising several hundred objections to my rulings made through the course of handling this case from the outset, up to and including the time of trial. I have at hand the litigants' voluminous briefs and have reviewed them carefully. I have also reviewed the entire transcript of the record in this case, which consists of approximately 6,000 pages. In addition, I have reviewed my trial notes and a host of exhibits presented in the case. Finally, I have reviewed rulings made prior to the time of jury trial.

Originally, this matter, already over four years old, was transferred here by Chief Judge O'Connor in March of 1986. In due course, defendant filed a massive motion for summary judgment. Preparation for that matter required a review of a host of depositions and exhibits. After all of the briefs and materials were reasonably digested, I took up lengthy and lively arguments. On October 30, 1986, I entered a full memorandum and order. I have reviewed that opinion more than once as it has served me well in convincing me that all of my rulings were correct and applicable here. I have reviewed it again in contemplation of defendant's motions.

Trial was set to commence on January 6, 1987. Apparently Allied's house counsel harbored certain misgivings pertaining to my style of court management and some commentary extended by me during the course of the hearing on summary judgment, and, for whatever reason,

chose to bolster its cadre of attorneys by retaining Foulston, Siefkin, Powers & Eberhardt, of Wichita, Kansas, to assist in the defense of this case. Following conference with Mr. Stout of that firm, and given his schedule and mine, the case was continued to March 31, 1987, for jury trial. On January 16, 1987, plaintiff moved to disqualify the Foulston firm due to an apparent conflict of interest, the firm having represented in a substantial way a key witness for the plaintiff. This person was Mr. Don Wurth, who testified fully in this case. The motion was taken up on January 27, 1987, at which time I was required to remove the Foulston firm as additional counsel for defendant. I have again reviewed that record and my findings.

Sometime in the summer of 1986, I advised another of defendant's local counsel, Mr. Weigand, that I knew Mr. Wurth and recalled some conversation with him in the past having to do with his trip to Peru. The full context of that conversation became the subject matter of a motion to recuse myself, which motion was taken up on February 23, 1987, when Allied belatedly seized on the subject. This gave rise to another lively hearing at which full findings were entered. Again, I have reviewed that portion of the file and my order, which became the subject of a mandamus proceeding wherein I was sustained. There were additional matters, mostly for continuances, each of which were denied. Finally the matter got under way.

On March 30, 1987, I addressed a host of motions in limine of the defendant, and again, each of my rulings has been reviewed in contemplation of this hearing. The findings and comments made then set the stage for this most provocative, complex, and fully tried jury trial.

During the course of trial, I received a steady flow of paper, i.e., motions and briefs, mostly generated by Allied's diligent counsel. I carefully reviewed and digested each; to be sure, many evenings and most weekends were spoken for. All trial rulings and bench memoranda have again been reviewed in contemplation of defendant's present motions.

Among defendant's trial motions was a motion for directed verdict, which was first taken up when plaintiff rested. At that time I heard full

arguments and directed a verdict on all of plaintiff's claims with the exception of its claim of fraud and breach of fiduciary relationship. Following presentation of the defendant's case, Allied renewed its motion, again with the filing of a voluminous brief, and defense counsel were afforded over two hours' time for full arguments. At that time, I directed a verdict on the fraud claim. All of these proceedings, arguments and rulings, have been reviewed. As indicated, as of that time the matter went to the jury on the issue of a breach of fiduciary relationship, if any, as may have existed between the litigants.

The instruction session, taken up with counsel for the litigants, was an exercise in itself. Over the previous weeks, we were at work in the preparation and polishing of that which I thought would be in order assuming plaintiff's case survived. I called for counsels' assistance as I was interested in their input and suggestions, and defendant's counsel most assuredly cooperated. I recall reviewing over 78 separate proposed instructions, each a brief unto itself. In any event, that session was also lively and helpful as I put in place the final instruction instrument. During the course of that time, I am certain I readdressed about every issue raised during trial, and here, on defendant's motions.

Now I have heard arguments of counsel, both sides, and am prepared to rule. I will do so in the order put to me by defendant in its motions, my findings and conclusions are intended to suffice the requisites of Rule 52. In contemplation of this ordeal, and knowing that I will make reference to certain events or circumstances that have transpired in the course of this case, for the most part my references can only be considered as examples drawn from this massive record. Indeed, for anyone, be they a circuit court panel, the litigants, or others, to fully appreciate this case, i.e., what happened here, my rulings, and the jury's ultimate verdict, a review of the record in its entirety is surely in order. Simply said, however tedious or time consuming it may be, there is no other way to capture the full flavor of this case.

In considering a Rule 50(b) motion for JNOV, the reviewing court "must view the evidence in the light most favorable to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence." *Ryder v. City of Topeka*,

814 F.2d 1412, 1418 (10th Cir. 1987). The court must give the nonmoving party the benefit of all inferences reasonably supported by the evidence, even though contrary inferences may also be reasonably drawn. *Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967). The court may not reweigh the evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981). The court should grant a motion for JNOV only if the evidence conclusively favors one party such that reasonable men could not arrive at a contrary verdict. *Western Plains Service Corp. v. Ponderosa Development Corp.*, 769 F.2d 654, 656 (10th Cir. 1985).

A motion for new trial should be granted by me only if prejudicial error has entered the record or substantial justice has not been done. *Johnson v. Colt Industries Operating Corp.*, 609 F.Supp. 776, 779 (D. Kan. 1985) *aff'd*, 797 F.2d 1530 (10th Cir. 1986). A motion that the jury's verdict is against the weight of the evidence can only be granted when the verdict is "clearly, decidedly or overwhelmingly" against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir. 1984). Thus, I should not set aside a jury's verdict unless it clearly appears that the jury reached a seriously erroneous result.

*Judgment Notwithstanding the Verdict*

I will first address defendant's motion for judgment notwithstanding the verdict, wherein Allied claims as follows:

1. Allied claims the fiduciary duty claim was "never pleaded, never presented in the pretrial order, never referred to in plaintiff's opening statement and never advocated in any brief or memo submitted in the entire course of this proceeding." The defendant claims the theory was injected into the proceedings by me, and that submission of the claim under the circumstances is contrary to the pleading requirements of Rule 9(b) and Rule 16(e), and violates the due process rights of defendant.

*Comment and Finding:* During arguments for directed verdict, I made the following statement:

> "I probably am the one that gave focus to the fiduciary claim as I saw it in this case and saw it from the outset in this case, whether addressed significantly by plaintiff or not. I had read the pretrial order which made it at least clear to me that plaintiff's claim that the parties are fiduciaries and that defendant had breached its duty in this case. I think I would have to say it is not spelled out with much precision. I'm not sure it was ever requested that it be spelled out with much. Let me — though I have always acquiesced in it being in."

(Tr., pp. 4548-4549.) Defendant seized on my remarks as acknowledgment that I did inject the fiduciary duty theory into this case. This is clearly not so, but here it is helpful to consider some background in this case. As the parties here well know, plaintiff originally brought this case against Allied for breach of certain oral contracts and breach of the written contract between the parties, for conversion, fraud, and for breach of fiduciary duty. The fiduciary duty theory was specifically set forth in plaintiff's amended complaint and in the final pretrial order. The second sentence of my memorandum and order on defendant's motion for summary judgment states: "This action is brought by the trustee in bankruptcy, Eric C. Rajala, for General Poly Corporation, against Allied Corporation for breach of contract, *breach of fiduciary duty*, conversion, and fraud." (Emphasis added.)

At the summary judgment stage, defendant's primary argument was that the parol evidence rule and the statute of frauds precluded the admission of any evidence of any dealings between the parties prior to the time the written contract was signed on September 21, 1979. Defendant also argued that the written contract was never breached. In arguing that judgment should be entered on the breach of fiduciary duty claim, Allied asserted that since the parties were not joint venturers, they owed each other no fiduciary duties. At that time I concluded that the parties were *technically* not joint venturers as that relationship is defined in Kansas law, i.e., the parties did not share in profits and losses. However, I did believe the parties' arrangement was analogous to a joint venture situation and refused to grant summary judgment on the fiduciary duty claim. In that regard, my discussion is relevant here and bears repeating:

The existence of a fiduciary relationship depends on the facts and circumstances of each individual case. *See Denison State Bank v. Madeira*, 230 Kan. 684, 640 P.2d 1235 (1982). "Whether such a relation is shown to exist is an evidentiary question. It is a question which must be determined in each case by the trier of fact." *Wilkinson v. Cummings*, 194 Kan. 609, 612, 400 P.2d 729 (1965).

In *Denison State Bank* the Kansas Supreme Court recognized that generally there are two types of fiduciary relationships:

> (1) Those specifically created by contract such as principal and agent, attorney and client, and trustee and cestui que trust, for example, and those created by formal legal proceedings such as guardian and/or conservator and ward, an executor or administrator of an estate, among others, and (2) those implied in law due to the factual situations surrounding the involved transactions and the relationship of the parties to each other and to the questioned transaction. The determination of the existence of a fiduciary relationship of the first category, though not without problems on occasion, is usually relatively simple. The second category . . . becomes more difficult to determine and must depend upon the facts in each case.

230 Kan. at 691.

. . . .

However, this [the court's ruling that there is not a technical joint venture] is not to say that a fiduciary relationship did not exist between the parties due to the special nature of their contractual relationship. If such a relationship existed, it was one "*implied in law* due to the factual situation surrounding the involved transactions and the relationships of the parties to each other and to the questioned transaction." *Denison State Bank*, 230 Kan. at 691 (emphasis added). In this case, there is a fact question as to whether such a relationship did exist.

Generally, a buyer/seller relationship does not create a fiduciary duty because the parties are dealing at arm's length in seeking for themselves the best advantage. *See Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d at 838. However, the facts in this case except it from the general rule. In *Denison State Bank*, the Kansas Supreme Court recognized that the right set of facts may create a fiduciary relationship even though the relationship itself (e.g., bank/depositor) is not fiduciary in nature.

In *Lindholm v. Nelson*, 125 Kan. 223, Syl. ¶3, 264 Pac. 50 (1928), the Kansas Supreme Court stated:

> A fiduciary relation does not depend upon some technical relation created by, or defined in, law. It may exist under a variety of circumstances, and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of one reposing the confidence.

In *Denison State Bank*, the court recognized that fraudulent concealment is a breach of fiduciary duty. The court quoted from *Wolf v. Brungardt*, 215 Kan. 272, 282, 524 P.2d 726 (1974), as follows:

> Where one party to a contract or transaction has superior knowledge, or *knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence*, or means of knowledge which are not open to both parties alike, he is under a legal obligation [in essence, fiduciary] to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge the expedience of the bargain.

230 Kan. at 693.

> In the case at bar, plaintiff alleges that Allied concealed certain material facts of which it had superior knowledge from plaintiff. Specifically, plaintiff claims that Allied concealed that the resin tested at the Lima, Peru plant was not Allied's own resin. Plaintiff also claims that Allied concealed the availability of good quality resin in the summer of 1980 and the spring of 1981. Moreover, plaintiff claims it relied on Allied's oral promises in making its decision to go into business in the first instance, and that Allied's breach of these promises was constructive fraud.
>
> Plaintiff's allegations set forth a sufficient basis on which a jury could find a breach of a fiduciary duty based on the unique relationship of the parties in their cooperative development of the resin, and based on Allied's fraudulent concealment. Accordingly, Allied is not entitled to summary judgment on this claim.

Thus, it is clear that at summary judgment stage Allied knew that the fiduciary claim would be submitted to the jury if the plaintiff presented evidence to support it.

At trial, plaintiff's strategy was to emphasize its breach of contract and fraud claims, rather than the fiduciary duty claim, apparently viewing these as its stronger theories. Thus, plaintiff did not address the fiduciary duty claim in its opening statement. As the plaintiff began to put forth evidence, I began having serious problems with the state of the evidence insofar as the contract and fraud claims were concerned. I believed that the evidence before me did not show that defendant's representatives intended to form a contract at the January 10, 1979 meeting; further, insofar as a written contract, the evidence showed that plaintiff knew what it was getting when it submitted orders to Allied, and accepted these orders once they came. I voiced my concerns to the plaintiff, and often precluded it from examining witnesses as to matters preceding the written contract. For example, at pate 2284 of the transcript, Mr. Edgar attempted to ask Hans Traver, president of General Poly, the following question: "What steps did you take when you couldn't get Allied resin?" The parties then approached the bench after an objection, and at page 2287 I made the following statement:

> Let me make this observation. As I said the other day, it's certainly not my practice to interfere with counsel as he tries his case his way. On the other hand, when objections are raised at a given point I'm prepared to rule, oftimes [sic] when I'm satisfied there is an absence of foundation, by example. It's also my practice to let you put in evidence, assuming it will be tied up. As to this very question, however, if you're offering it on the strength of having established fraud or the oral contract and you tell me that you have offered all that you're going to offer on that score, and I believe you probably have, and that we've heard it all, I'm ready to rule with regard to the state of the evidence of fraud and/or the relevancy of the alleged oral agreement. Maybe we ought to recess the jury and hash that out.

Shortly thereafter, in an in [sic] chambers conference, I expressed my concerns with the evidence to the parties, and indicated that based on the evidence before me I would most likely direct a verdict for defendant on the claims of breach of contract and fraud. (Tr., pp. 2290-2308.) In light my statements at that time, plaintiff considered "truncating" its case in order to file a quicker appeal than if it continued through the lengthy trial. (Tr., p. 2317.) At that point, it appeared that plaintiff's case was virtually over. That is, until the cross-examination of Hans Traver began. For whatever reason, defendant insisted upon an extensive cross-exam of Hans Traver. Here the witness was asked to explain his conversations and dealings with Mr. Heath, the director of marketing. Ironically, counsel addressed conversations which I had previously denied as hearsay and irrelevant. At page 2837 the testimony is as follows:

> A Paul Heath and he said: "Hans, during our development program, from time to time we are going to produce off-grade down in Baton Rouge, and could you help us work that off? It might work to both of our benefits. You help us get rid of the off-grade and I can get you some good pricing on that." And I said: "Sure, let's do that."
>
> Q All right. Now, did you receive off-grade pursuant to those discussions?

A Yes, of course. Lots.

Now, this situation is hardly the kind contemplated in the Uniform Commercial Code, wherein, if the parties contract to buy and sell certain specified goods through an arm's length transaction and then the product is accepted, the buyer waives his rights to reject the nonconforming goods (U.C.C. § 2-607). Defense counsel persisted with this line of questioning, and asked the following question at page 2686:

> Q And then you advised Allied, Mr. Paul Heath, did you not by telex dated July 8, 1981, that you were cancelling that order? I refer you to defendant's exhibit 1467 which also came from the files of General Poly and I believe that that's the telex that was sent by you. Is that not true, Mr. Traver? . . . Would you please read that portion of the subject in the message that you gave to Mr. Heath, Mr. Traver?
>
> A Attention Mr. Paul Heath, Allied. Concerning our letter dated 3, July, 81. Please disregard our offer to purchase the hopper car 41-260 and to mail the check. Best regards, Hans H. Traver.
>
> Q And again there is nothing in this telex that suggests or indicates in any respect that there has been some breach of an obligation or understanding between Allied and General Poly in June of 1981, is there?

This line of questioning then opened the door for plaintiff, on redirect, to offer into evidence a letter written by Hans Traver the night before that telex was sent. The letter was written to Paul Heath and stated at one point: "We also tried our best to live up to our promise to use the material originating from last year's start up runs in your plant. Never did we complain to you about the frustrating difficulties we went through when your resin simply wouldn't make a sellable film and had to be blended by hand with other products. . . ." (Tr., p. 2823.)

The mention of an "agreement" between General Poly and Allied regarding General Poly's use of Allied's off-grade resin brought to the

fore the fact that this was not a normal buyer-seller relationship. At this point, because I had practically directed a verdict against plaintiff on the entirety of its claims, I did suggest to plaintiff that I would allow plaintiff to proceed along the line of discovering what sort of special relationship existed between General Poly and Allied. At page 2855 of the transcript I stated: "We are in the quest for truth here and we are trying to find out what are the relevant facts, and if they come to light in the trial of a lawsuit, so be it. I don't think anyone could complain for being surprised, nor should complain that I raised the question in the setting that I found the plaintiff's plight and seized upon that little statement — maybe not seized upon it, but it struck me that it could be relevant and suggests that plaintiff's counsel is at liberty to explore it."

At page 2859 I further noted: "Does the defendant then in any way, consistent with the terms of this agreement, which is for exploration and development — it may be as a fiduciary, I don't know that is out there somewhere — have some obligation to acquiesce in the plaintiff's circumstances and to make prime resin timely available on some reasonable basis? If so, and if the defendant has failed or refused, what is the effect insofar as the plaintiff's imminent collapse and ultimate damages are concerned?"

Based on these observations by me, the plaintiff's counsel, being very able and competitive, did bounce back. I appropriately allowed them to recall witnesses in order to present evidence of the unique relationship between the parties and the effect of Allied's actions on the General Poly business.

At that point, and from then on, defendant has continually objected to this theory, i.e., the fiduciary duty theory, and claimed that I injected this theory into the trial. This, though, was the same theory discussed at length by me in the summary judgment opinion. Allied cannot now claim surprise by virtue of the fact that plaintiff initially proceeded on the contract and fraud theories alone insofar as presenting its evidence. Indeed, if anyone was prejudiced in the trial, it was the plaintiff due to the close reins I held on plaintiff in presenting evidence on the contract and fraud theories.

Additionally, at the time of directed verdict, I made the following comments which are relevant here:

> Alternatively, this case has been premised on the claim of a breach of fiduciary relationship mutually enjoyed between the parties in that they were engaged in a developmental program to their mutual benefit: the parties have in hand the technical expertise, the experience and equipment necessary for the production of high molecular weight resins; and the defendant being desirous to enter into the high molecular weight field as producers. This very relationship, given the circumstances from the outset, had put in place a repose of trust and confidence in the other, it was a sharing akin to a task force, I believe someone said, a task force effort; both of them were on the ground floor of the endeavor; both were optimistic as to success, given input from their colleagues; and each were dependent upon the other. That, in a nutshell, is what I surmise to be the plaintiff's claim of breach of fiduciary.
>
> Drawing on this latter for the moment, defendants have raised some concern with regard to the court's acquiescence in that claim, precisely as I have just described it. This is a claim that is part of the pretrial order. It was a claim addressed at summary judgment. I think I said at some posture in this case, however, it was not necessarily a claim addressed by plaintiffs in their trial brief, nor their requested instructions, nor in their opening statements, nor addressed in any deliberate way in the course of adducing its evidence. As a consequence, as the plaintiff's claim came on, through the course of a goodly number of weeks, it was a dormant one so far as I could garner, and insofar as the plaintiff's introduction of substantive evidence was concerned. I think I said as well somewhere in this case it was a claim that, if you will, was so close that I couldn't see it, nor did I, until it came to light in the course of cross-examination of Mr. Traver.

(Tr., pp. 4584-4585).

Thus, the theory of breach of fiduciary duty was not injected into the trial by me. I just opened a door I had previously closed on plaintiff.

Defendant was in no way prejudiced by this action and certainly was not surprised by the breach of fiduciary duty claim. As such, defendant's first claim for judgment notwithstanding the verdict is denied.

2. Allied claims that there is not fiduciary relationship as a matter of law: (a) it was undisputed that the primary relationship between General Poly and Allied was that of buyer and seller; (b) the only agreement between the parties was the September 21 contract which did not create a fiduciary relationship; (c) the parties acted at all times in their individual self interests; (d) "the court's apparent conclusion that a fiduciary duty might have arisen through General Poly's purchases of Allied's off-grade resin as an act in subordination of General Poly's self interest is both legally and factually untenable;" (e) the evidence failed to establish that Allied consciously accepted the obligations of a fiduciary.

*Comment and Finding:* The evidence presented at trial clearly supports the jury's verdict that a fiduciary relationship existed between the parties and that the fiduciary duties were breached by Allied.

In subparagraph (d), Allied objects to what it calls the court's conclusion that a fiduciary duty arose when General Poly purchased off-grade resin from Allied. This argument reflects Allied's misunderstanding of fiduciary law and its continued attempt to accuse me of creating the fiduciary theory. Contrary to this mistaken assumption by Allied, the evidence clearly shows, and the jury found, that a fiduciary relationship existed between these parties from the beginning of their negotiations. Many of Allied's objections with regard to the fiduciary duty law seem to stem from its belief that fiduciary relationships must always be of the sort that exist between, say, attorney and client or guardian and ward. However, as was set forth in my summary judgment opinion, there is another category of fiduciary relationships, i.e., those implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions. *Denison State Bank v. Madeira*, 230 Kan. 684. The fiduciary relationship existing between General Poly and Allied is of this second type. Further, their relationship is analogous to a joint venture situation. Although I concluded at

summary judgment stage that a technical joint venture did not exist between these parties because they did not share profits, they did have a "joint cooperation agreement" very similar to a joint venture agreement. Thus, the type of fiduciary duties existing between these parties may be best understood by recognizing its analogy to a joint venture relationship.

Of course, the relationship between joint venturers is fiduciary in character and imposes upon both participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to their joint enterprise. *Eagle-Picher Co. v. Mid-Continent Lead & Zinc Co.*, 209 F.2d 917 (10th Cir. 1954). In a joint venture situation, the fiduciary relationship arises when the parties begin their negotiations. In 46 Am.Jur.2d on Joint Ventures, the following general statement is made as to *when* the fiduciary relationship arises:

> The fiduciary relation upon which such obligations are consequent does not necessarily await the inception of the relationship of joint venturers. It may be predicated upon an arrangement to assume such a relationship. Thus, it is the plain and imperative duty of promoters of a syndicate, toward persons who are invited to cooperate in the enterprise, not only to abstain from stating as a fact that which is not a fact, but not to omit to state any circumstances within their knowledge the existence of which might in any way affect the extent or quality of the advantages held out as inducements to the others.

46 Am.Jur.2d *Joint Ventures* §50 (1969).

By analogy, the fiduciary relationship began between General Poly and Allied at the January 10, 1979 meeting when the parties agreed to enter a joint cooperation agreement and when Allied made certain representations about the extent of its resin development. Thus, at the time of the Peru test, Allied had a fiduciary duty to reveal the true source of the resin tested.

Finding a fiduciary relationship exists, even though the parties are not technically joint venturers, is entirely consistent with the law of

Kansas. *See Paul v. North*, 191 Kan. 163, 380 P.2d 421 (1963). It is also consistent with the law in New York. *See Penato v. George*, 52 A.D.2d 939, 383 N.Y.S.2d 900 (N.Y. App. Div. 1976).

Contrary to Allied's arguments, the evidence clearly shows that the parties did not have an ordinary buyer/seller relationship. When the parties' relationship began, Allied did not have a product to sell which General Poly could buy. In January of 1979, Allied represented to General Poly that it had developed an experimental resin but it still needed work. Allied needed General Poly's special equipment and specially trained people to help in this development. Allied, in the absence of plant equipment, was hoping it "could pull itself up by its bootstrap." (Pl.'s Ex. 1654.) General Poly, of course, needed a domestic supply of resin. So the parties agreed to enter a very unique joint cooperation agreement in order to develop this resin. Of course, unbeknownst to General Poly, Allied had not in fact developed any type of resin at all.

The written contract of September 21 (Pl.'s Ex. 420) reflects the unique arrangement between these parties. Allied received the "royalty-free, exclusive right and license to use extrusion technology developed by General Poly, and a perpetual royalty-free, nonexclusive right and license to use such extrusion technology" (Pl.'s Ex. 420); and General Poly received special financial accommodations and the first right of purchase of any prime resin developed by Allied. The parties agreed to maintain in confidence all information relating to extrusion of high density films for a period of five years. This agreement is highly unusual and is not that of a typical buyer/seller. Further, General Poly's purchase and use of Allied's off-grade resin also demonstrates the unique nature of the relationship. As reflected in Traver's letters of July 8, 1981 (Pl.'s Ex. 1621), to Allied's Paul Heath, General Poly agreed to purchase the offgrade resin, not only to meet its own pressing need for resin, but also to help Allied in its attempt to develop a prime resin. Allied's own people recognized the unique nature of the relationship, as was demonstrated by Jecha, a state salesman with whom plaintiff's principals first communicated, in his answer to the following question:

> Q Are you familiar with other written agreements between Allied Corporation and any customer you ever called on in your entire career association whereby Allied and that customer agree in writing that they are going to work together to jointly develop some new product or some new resin and that any new resin or new product developed as an outgrowth of that joint program, customer is going to be entitled to purchase the first so many pounds every month of whatever is developed? Have you ever heard of that happening on any customer you have ever dealt with?
>
> A. Hell no.

(Tr., p. 441). Pat Snell, then the technical service engineer, also testified via deposition that the opportunity to use General Poly's specialized extrusion lines to test resins represented a "unique opportunity." (Tr., p. 1784.) This gentleman was the Allied employee who first seized upon the opportunity to do business with the principals of General Poly, as it was his responsibility to develop a successful venture for Allied. With the knowledge of his principals, he suggested that Allied fully cooperate with the principals of General Poly and take advantage of the occasion to test in Peru. As plaintiff's Exhibit 99 confirms, he tentatively arranged with Traver to supply "a developmental resin ostensibly that of Allied, but which, of course would be *rebagged* B5920F." Given some success, this would have assisted Allied in making entry into the HDPE film market in the United States. Whatever his reasdns, at no time in the course of this case were representatives of plaintiff ever apprised of this rather devious scheme. I am satisfied that the failure to disclose was not overlooked by this jury. It is a classic example of constructive fraud.

The determination of whether a fiduciary relationship exists is a fact-bound inquiry. Here, there was substantial evidence that the parties were acting as fiduciaries. I instructed the jury according to Kansas law on the definition of a fiduciary relationship, of the standard of proof, and of the definition of fiduciary duties.

I previously addressed the sufficiency of the evidence to submit the fiduciary claim to the jury at the directed verdict stage, where I said,

> Mr. Traver's testimony just cries out as regards the parties' mutual trust and their mutual risk in finally reaching a commercial high molecular weight resin. I believe his letter of July 8, 1981, says it all in [stating that such a relationship existed] between a party. In my view, and given definition of a fiduciary, circumstances here are such that the jury may well find these parties were indeed fiduciaries, and once having established that issue, can then be asked to ascertain if, in that status, this agreement was breached. In other words, as fiduciaries, the parties exercised the contract. Thus, as a consequence, I will overrule the motion for directed verdict as a claim for breach of fiduciary relationship.

(Tr., p. 4592).

Accordingly, Allied's motion for judgment notwithstanding the verdict, because there was no evidence of a fiduciary relationship, is denied.

3. Allied claims that the evidence fails to establish that Allied had any duty to General Poly because: Allied fully performed under the written contract; Allied's conduct conformed to the UCC; there was no oral contract; the only obligations between the parties were contained in the written contract; General Poly know what it was getting before it ordered any resin from Allied; General Poly's acceptance of such resin bars any remedy it would have against Allied.

*Comment and Finding:* These arguments were addressed by me at directed verdict stage. Clearly, in a commercial context, the defendant's arguments are well taken. However, defendant fails to address that it wasn't acting in a commercial context, but was acting as a fiduciary, as the jury so found. At the time of directed verdict, I made the following statements in this regard:

> [In the commercial setting], I've had no apology for any rulings or commentary that have been extended here, particularly to the plaintiff with regard to the state of their case at points of time from the outset through its course. There was a time when we all repaired to chambers and I took some care to explain to plaintiff

> what I thought was the state of their case, all of which was drawn upon that context, i.e., a commercial setting controlled by requisites of the commercial code. I mentioned that I have made rulings as they arise, and dependent upon the state of evidence at the time. . . . As I listened to the plaintiff's evidence, it seemed clear that if it was a claim for breach of contract, it was in part because the plaintiffs had ordered and reordered time and again certain off-weight resins from Allied, received them, knowing they were off-weight, accepted them as off-weight, used them without any remonstration or complaint or attempts to set aside the terms of the agreement or to claim that the terms had been breached. I have always then been persuaded, if this case is premised in its commercial setting, that the provisions of Section 2-606 through 608 probably control this case, and as a consequence, plaintiffs had no breach of contract.
>
> As to the oral contract, which is suggested here as terms reached in January of 1979, and which go hand in glove with the written agreement, I have also said in this case, again in its commercial setting, that there is no showing here that defendants, through their representatives, have accepted them, particularly that portion which address price or time of delivery. Simply said: there has been no meeting of minds shown, and as a consequence those issues did not appear to me to be jury questions.

(Tr., pp.4586-88).

I went on to find that plaintiff had put forth evidence that the parties were fiduciaries. Acting as fiduciaries, they had obligations to each other that went beyond the terms of their written agreement and took them out of UCC application. When parties are fiduciaries, they may be in breach of fiduciary duties if they fail to act with the utmost good faith and fairness even though they technically comply with terms of a written contract, and with the requirements of the Uniform Commercial Code. As such, Allied's argument that it should be granted a new trial because it owed no duties to General Poly other than those specified in the written contract must be denied.

4. Allied claims that the evidence established only that General Poly breached its agreement to pay Allied for the resin.

*Comment and Finding:* For the reasons set forth above, this is not what the evidence established and this ground for judgment notwithstanding the verdict is denied.

5. Allied claims that there was no evidence presented that General Poly gave notice to Allied that it had breached a fiduciary duty or ever complained to Allied that it had breached a fiduciary duty.

*Comment and Finding:* Allied offers no support for the proposition that it was entitled to notice of its own breach of fiduciary duty, and such is not required by law as a prerequisite to bringing suit. Allied at all times had full notice of the special relationship between the parties, and knew that it failed to reveal the true state of its development of resin at the beginning of the parties' relationship, and the true source of the resin which was tested in Peru. At the end of the relationship between the parties, Allied knew that its withdrawal of credit to General Poly would put General Poly out of business. This notice was given to Allied through Paul Heath by Hans Traver's letter of July 8, 1981.

The motion for judgment notwithstanding the verdict for failure to give notice is denied.

6. Allied claims that there was no evidence that Allied's actions caused the demise of General Poly. General Poly's losses resulted from: undercapitalization; poor sales performance; bag making capacity limitations; advent of linear low density polyethylene as a competing material; recession; price squeeze; management and personnel problems. Even if any of General Poly's losses were caused by Allied's off-grade resin, General Poly knew what it was getting when it ordered this resin. Further, the plaintiff's expert opinion testimony that General Poly would have survived and become profitable after 1981 was based on assumptions derived from Podolak's opinions in testifying as to the cause of General Poly's financial failure. Podolak lacked qualifications to make these opinions; moreover, the opinion that General Poly would be able to produce and sell 780,000 lbs. of product each month was false. Plaintiff's experts also relied on the following false

assumptions: that the average cost of resin would be 42 cents per lb.; that the average selling price for the product would be 99 cents per lb.; that General Poly would be able to borrow an additional $1.3 million to continue in operation; that General Poly would have a competitive edge. There was no evidence that any bank would have been willing to lend an additional $1.3 million to General Poly in 1981 under any circumstances.

*Comment and Finding:* In Instruction 12 the jury was instructed that it would have to find Allied's conduct was a "substantial contributing factor" in causing the collapse of General Poly before it could assign liability to Allied. This is a higher standard than the "but for" type of analysis. *See Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984). In Instruction 8, the parties' contentions, the jury was informed of Allied's contentions as to the various reasons for the demise of General Poly. Allied also argued each of these causes during closing argument. Thus, Instruction 12 required the jury to consider each of these contentions of Allied for the demise of General Poly and then to rule them out. This was the only way the jury could conclude that Allied's breach of fiduciary duty was a substantial contributing factor to the demise of General Poly.

The jury was further instructed in Instruction 12 that Allied's breach could not be the "substantial contributing factor" to General Poly's demise if it "would have collapsed despite defendant's breach." My instruction was more than adequate as to proximate or legal cause.

Allied argues that Mr. Walker admitted in principal under oath that the advent of linear low density polyethylene was the primary cause of General Poly's failure, and that this establishes as a fact that Allied could not have been the primary cause of General Poly's losses. However, Allied mischaracterizes Walker's testimony. At page 891 of the transcript, Mr. Walker testified on direct examination that "the reason that General Poly failed is that we never had the material that was promised to us by Allied. We never had a high molecular weight high density poly product." On cross-examination, Mr. Walker was asked the following questions:

Q All right, now you've testified on many occasions that the inability to secure high molecular weight at a competitive price was a reason for General Poly's demise or failure. Is that right?

A Yes, sir.

Q But by this time, Mr. Walker, it was also true that you felt that the introduction of linear low density to the American marketplace was a primary reason for the demise of General Poly; isn't that also true?

A Mr. Beck, I think my feeling was all the way through that there was a place for linear low. It was a clear product; and it did not interfere with the many markets for high molecular weight high density. All of our equipment was geared to high molecular weight, and linear low has its place in the marketplace today as does high molecular weight.

Q Mr. Walker, my question is: by this time you felt that the introduction of linear low density to the American marketplace was the primary reason for General Poly's demise? Isn't that true?

A No, that is not true.

(Tr., pp. 1603-04). Defendant then attempted to impeach Mr. Walker with statements he had made in a deposition in a previous case to the effect that the introduction of linear low polyethylene in the American marketplace was one of the primary contributions to the demise of General Poly. (Tr., p. 1609.) However, on redirect, Mr. Walker explained that the introduction of linear low resin hurt them because they didn't have the high molecular weight resin available to be able to "downgauge our can liners" in order to compete with the linear low market. (Tr., p. 1623.) Clearly, this testimony from Walker did not require the jury to conclude that as a matter of law Allied's breach of its fiduciary duties could not have been the substantial contributing factor to General Poly's demise.

Allied also argues that Walker's testimony that General Poly "never had the necessary ingredients for the company to be successful" (Tr.,

p. 1599) precluded any finding that Allied was the cause of General Poly's failure is without merit. Read in context, Mr. Walker's statement refers to the fact that General Poly, during the time it existed, never had a domestic supply of affordable prime resin as it had been promised by Allied, and that this supply was necessary for its success.

Defendant also objects to the Podolak testimony, arguing that his assumptions were conclusory and contradicted by credible evidence. I addressed these objections at page 4241 of the transcript. At that time I stated: "He's a director of the company and he was in charge of sales and he knew something about the manufacturing process and price.... Seems to me he has every right to be able to express what he understood the situation was. That is for cross." Defendant then objected that "he left in 1980, now we are talking about 1981 and he's engaged in another business." And I replied, "He can also read. I'm going to let him testify." Thus, I previously addressed these objections and the defendant is overruled on this point.

Finally, defendant argues that the testimony was undisputed that in order for General Poly to continue to operate for the remainder of 1981 it would have needed to borrow another $1.3 million, and that the testimony was that it would be unable to obtain such money. However, Walker testified that had Allied performed as expected in May through June of 1981, and sold General Poly the new prime resin, he would have been able to raise any necessary additional capital to keep the business going. (Tr., pp. 4003, 4015-16.)

Accordingly, defendant's motion for judgment notwithstanding the verdict for the reason that plaintiff failed to establish causation is overruled.

7. Allied claims that General Poly's debts are not an appropriate measure of damages. The debts do not represent damage suffered by General Poly; to the extent they are intended to represent the value of General Poly, they represent a double recovery, since the jury was also allowed to award lost future profits; awarding such damages charges Allied with responsibility for losses from impairment of capital, which is contrary to law; the evidence does not establish that these debts resulted from any action by Allied.

*Comment and Finding:* In Instruction 13, the jury was instructed that one of the elements of damage it could consider was "the amounts owed by General Poly for creditors' claims in its bankruptcy proceeding, including interest accrued on the creditors' claims through March 31, 1987." During the instruction conference I noted:

> "I think I said early on in this case I have had some problems how to address this case, being one out of bankruptcy. What I have attempted to do is to put in place a structure that should the plaintiff win, would have reasonably funded sufficient amounts to handle just what is included here, that is, take care of all of the creditors, reinstate the investors, recompense the bond company. With that done, everything is whole, but they are back at a point then where this company is still collapsed one, and does seem to me that the plaintiff company, debtor, ought to be able to be reasonably compensated for future profits as well so that's the reason for it."

(Tr., p. 5715.) Under Section 323(b) of the Bankruptcy Act, the trustee in bankruptcy may recover any damages which the debtor could.

As I stated during the instruction conference, the purpose of the actual damages was to make General Poly whole, i.e., put it in the position it would have been in had it not been for Allied's breach of its fiduciary duties. The jury concluded that General Poly was forced out of business by Allied's wrongful acts. Thus, not only did General Poly lose the chance to earn future profits, it also lost its ability to pay prebankruptcy debts it otherwise would have paid. The expert's testimony as to lost future profits assumed that the debts would be paid; therefore, such an award did not amount to double recovery. Therefore, General Poly's debts were an appropriate measure of damages.

Allied, in its reply brief, argues that the Tenth Circuit's decision in *Mattingly, Inc. v. Beatrice Foods Co.*, No. 83-2206 (10th Cir., Dec. 24, 1987), requires that I set aside the jury's verdict, as the elements of damage the jury was allowed to consider were erroneous. I believe that the *Mattingly* case is distinguishable and that defendant's arguments are misplaced.

*Mattingly* was a case involving fraud and breach of warranty. I heard the case at the trial level where it was tried to the bench. In that case it was shown that the plaintiff company, which had been a highly successful and profitable swimming pool construction company, was literally forced out of business by using the defendant's pool-coating product. It was shown that the defendant's product was completely unsatisfactory, and that defendant had defrauded plaintiff in regard to its qualities, as well as breached express warranties.

In awarding compensatory damages, I employed a "forced sale approach," i.e., requiring the defendant to "buy" the assets *and* liabilities (creditors' claims, warranty expenses, third party claims) valued at the date plaintiff was forced out of business.

On appeal, the Tenth Circuit reversed as to the method of calculating damages. The court held that the proper measure of damages *when an established and ongoing business* is destroyed is the difference between the company's market value before and after the injury. The court further held that the date on which to base the "before injury" figure is not the day before the company goes out of business, but rather is the date the plaintiff first began purchasing defendant's product.

While the case is to be remanded here in order for me to recalculate damages consistent with the Tenth Circuit's opinion, the mandate has not been forthcoming as the case is now before the Tenth Circuit on rehearing, at the instance of the plaintiff. Even so, the findings are deserving of comment now.

From the foregoing "capsule" of the *Mattingly* case, it is obvious to me that it does not apply, nor should it, here. *Mattingly* was a breach of warranty and misrepresentation case between an ordinary buyer and seller of a product. The product failed to perform as warranted and Mattingly was faced with endless warranty work which eventually ruined its business. Here, the parties were operating under a contract as fiduciaries. The corresponding fiduciary duties were breached by Allied, eventually causing plaintiff's demise. Unlike the situation in *Mattingly*, it was plaintiff's relationship with, and reliance on, defendant which caused it to go into business in the first instance. The parties'

fiduciary relationship was such that a continuing, profitable relationship was contemplated by the parties. Accordingly, any "difference between market value" approach is simply unworkable. Employing such a measure of damages would result in a nonaward of damages since General Poly did not yet exist *prior* to the injury, and had little, if any, value by the time it filed for bankruptcy. Yet the plaintiff here suffered incredible damages due to defendant's action and had a right to compensation. In addressing the jury on how to calculate such an award, I proceeded at all times under the theory that where there is a right, there must be a remedy!

This case is clearly unique: General Poly went into business based on the assurances from Allied as to the state of its resin development. It later was forced out of business because Allied failed to supply a usable resin, and — when it finally had one available — refused to accommodate its fiduciary in order to enable it to remain in business. Allowing plaintiff, the trustee in bankruptcy, to recover the debts plus the initial investments, plus three years' lost profits, accurately compensated plaintiff by putting it in the position it would have been in had Allied not breached its fiduciary duties.

The "elements of damage" instruction given here was correct.

8. Allied claims that the equity investments of General Poly are not an appropriate measure of damages because: the equity investment represents only a benefit accruing to General Poly by virtue of contribution of shareholders; to extend it represents the value of General Poly it amounts to a double recovery, since the jury was allowed to award lost future profits; allowing the equity investment as damages results in charging Allied with responsibility for losses resulting from the impairment of capital, contrary to law; the equity investment was accrued prior to the time Allied and General Poly signed the written contract.

*Comment and Finding:* At page 5715 of the transcript, during the instruction conference, I overruled Allied's objection to awarding the equity investment.

Contrary to Allied's argument, and as discussed previously, the fiduciary relationship between these parties was formed at the time the parties began their negotiations. The evidence established that General Poly's promoters' decision to incorporate the business and build a plant was due to representations by Allied and due to the decision to enter a cooperation and secrecy agreement with Allied. In turn, the equity investments were made based on these assumptions. As such, the ultimate loss of capital occurred as a direct result of Allied's representations, and the later loss of the investment was due to Allied's conduct in failing to deal fairly and in good faith with General Poly once prime resin became available. Therefore, because the jury did find that Allied had breached its fiduciary duties, Allied's actions necessarily caused the loss of the equity investment. Accordingly, the jury was correctly instructed to award the loss of the equity investment, and so Allied's motion for JNOV on this point is denied.

9. Allied asserts that General Poly's claim for lost profits should have been dismissed as a matter of law because: General Poly was never profitable, other problems caused its demise; PIK 9.46 provides that "before one may recover damages for loss of profits it must be shown that the business had been in successful operation for such period of time as to give it permanency and recognition, and that it was earning profits that can be ascertained or approximated with reasonable certainty;" plaintiff's expert witness on lost profits relied for his calculations on the irresponsible estimates of Podolak an unqualified lay witness, on the total sales General Poly would have attained in future years; General Poly's comptroller, Randy Apgar, admitted that any projection of profits by him would be speculative; and no objective basis for the calculation of lost profits is offered.

*Comment and Finding:* On pages 5710, 5712-15 of the transcript, during the instruction conference, I overruled Allied's objections to the lost future profit instructions.

In Instruction 14, I instructed the jury:

> Loss of profits resulting from a breach of fiduciary duty may be recovered when the loss of such profits is a direct and

> foreseeable consequence of the breach, and when such lost profits are proved with reasonable certainty and when they may reasonably be considered to have been within the contemplation of the parties to the fiduciary relationship.

This instruction accurately states Kansas law. *See Vickers v. Wichita State Univ.*, 213 Kan. 614, 618-21, 518 P.2d 512 (1974); *State Office Systems, Inc. v. Olivetti Corp. of America*, 762 F.2d 843, 846 (10th Cir. 1985). In Instruction 13 the jury was specifically told that it could not speculate in awarding damages.

At pages 4284-4329 of the transcript, Roman Weil testified as to the lost profits of General Poly for the period of 1981 through 1984, and his calculations for the same. Professor Weil based his projections on General Poly's historical operating costs, market and sales experience, and past and future market data. At the time Weil was allowed to testify, I ruled that there was foundation for his testimony. This ruling was correct. Moreover, as has been previously discussed, Podolak was qualified to give his projections on sales figures, and so it was not error to allow Weil to rely on these figures. Thus, there was sufficient competent, nonspeculative evidence to send the issue of lost profits to the jury.

Further, I did not err in refusing to give PIK instruction 9.46. While successful operation of a business is generally required before lost profits can be awarded, when it is the defendant's own wrongful conduct which causes the business to not be successful and which renders difficult the ascertainment of precise damages suffered by plaintiff, the defendant is not entitled to complain or to receive such an instruction. *Auto West, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 565 (10th Cir. 1970). Under the circumstances, evidence was properly admitted as to the profits General Poly would have made if Allied had fulfilled its commitments. *Republic Nat'l Life Ins. v. Red Lion Homes, Inc.*, 704 F.2d 484, 488 (10th Cir. 1983).

Allied's argument that awarding both lost profits and loss of the equity investment plus debts owed amounts to double recovery has been addressed and is without merit.

Accordingly, defendant's motion for JNOV for the award of lost profits is denied.

10. Allied claims that lost profits were not shown to have been contemplated by the parties. There was no showing that Allied was General Poly's sole supplier.

*Comment and Finding*: In Instruction 14, the jury was instructed to award lost future profits only if they are shown to have been within the contemplation of the parties.

The evidence at trial showed that Allied was aware at all times that the purpose for entering the contract with General Poly was so that General Poly would have a domestic supply of resin, because the industry-standard German Hoescht resin had to be imported and was too high priced. Thus, Allied should have known that its failure to ever supply General Poly with prime resin would result in lost profits to General Poly. Under Kansas law, losses that are a necessary result of a breach of contract are presumed to have been contemplated by the parties. *Duffin v. Patrick*, 216 Kan. 81, 530 P.2d 1230 (1975). In this case, General Poly's lost profits flow directly from Allied's breach of fiduciary duties. Accordingly, Allied's motion for JNOV on this point is denied.

11. Allied claims that there was no basis for awarding punitive damages because: there was no evidence Allied acted with fraudulent intent; a breach of fiduciary duty alone does not support an award of punitive damages; the size of punitive damages awarded in this case is excessive.

*Comment and Finding*: Kansas law is very clear on the point that punitive damages are proper when a breach of fiduciary duty is involved. *Schraft v. Leis*, 236 Kan. 28, 39, 686 P.2d 865 (1984); *Newton v. Hornblower*, 224 Kan. 506, Syl. ¶13, 582 P.2d 1136 (1978). In the 1981 Supplement of PIK, there is an addition to PIK 9.44 on punitive damages. That suggested instruction did read: "If you find that plaintiff is entitled to recover, [and you also find that the conduct of the defendant ____ (constituted fraud)], then in addition to the actual damages to which you find plaintiff entitled, you may award plaintiff

an additional amount as punitive damages. . . ." The addition in the supplement states: "Punitive damages as well as actual damages may be recovered where a breach of fiduciary duty is involved," and cites *Newton* as authority.

The reason for allowing punitive damages where there is a breach of fiduciary duty is that such a breach amounts to constructive fraud, and punitive damages are appropriate in fraud cases. There is no merit to defendant's argument here that because I directed a verdict on the fraud claim, there could have been no "constructive fraud" in this case. In directing the verdict on the fraud claim, I found that in a commercial context Allied had no duty to disclose the true source of the Peru test resin because it had a license for the same. Thus, in a commercial setting there was no "intent to deceive." I was also convinced that in a commercial setting the statute of limitations had probably run. However, when the parties are viewed as fiduciaries, defendant had a duty, according to Kansas law, to reveal those facts which were not readily discoverable by plaintiff and of which defendant had knowledge which would better enable plaintiff to judge the expedience and reasonableness of the transaction. In this context, Allied had a duty to reveal the true source of the Peru-tested resin. The failure to do so amounted to "constructive fraud" and breach of fiduciary duty. There was no requirement, under Kansas law, that I give a further instruction to the jury that it must find "malice, oppression, or outrageous conduct" in order to award punitive damages. A breach of fiduciary duty is considered malicious and oppressive conduct in and of itself. Thus, I correctly sent the issue of punitive damages to the jury.

Allied next argues that the jury's $60 million award should be vacated because it is "particularly shocking" and "could only have resulted from passion and prejudice" or "misunderstanding by the jury."

In this case, the jury was instructed that in awarding punitive damages it should take into account the nature, extent, and enormity of the wrong, the intent of the party committing the wrong, any mitigating circumstances, the amount of actual damages recovered, the defendant's financial condition, and the probable litigation expenses.

"When trial is to a jury, the law entrusts the amount of exemplary damages to the good conscience and common judgment of the jurors. When a jury has returned a verdict there is a presumption it acted reasonably, intelligently and in harmony with the evidence." *Henderson v. Hassur*, 225 Kan. 678, 697, 594 P.2d 650 (1979). The jury's award should be upheld unless it is clearly demonstrated through specific evidence that the award was the result of passion, prejudice, or improper influence.

Recently, the Supreme Court of Kansas, in *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 481, 738 P.2d 1210 (1987), made the following observations as to considering when an award of punitive damages is excessive:

> Punitive damages are awarded to punish the wrongdoer for his malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to "restrain and deter others from the commission of like wrongs." [Cite omitted.] . . . An award of punitive damages "must be viewed in light of the actual damages sustained, the actual damage award, circumstances of the case, the evidence presented, the relative position of the plaintiff and the defendant, and the defendant's financial worth. [Cite omitted.]

In *Tetuan*, the Supreme Court upheld an award of $7.5 million in punitive damages. This award represented a ratio of 5 to 1 to the amount of actual damages awarded ($1.7 million). The Kansas court noted that it had upheld punitive damage awards in ratios as great as 30 to 1. In the case at bar, the ratio is 6 to 1.

Another factor the court looked to in *Tetuan* was the net worth of the Robins Company. The amount awarded in that case was slightly more than 1% of Robins' net worth. In the case at bar, the amount awarded by the jury was also slightly more than 1% of Allied's net worth. During the trial, plaintiff introduced evidence that Allied's net worth was $5.3 billion. (Tr., p. 4339.) Thus, although the $60 million awarded is an extremely large amount of money, Allied Signal is an extremely wealthy corporation. The question one must ask is: what

size of an award does it take to get the attention of a corporation the size of Allied Signal? Clearly, the award had to be sizable to have the deterrent and punishing effect that punitive damages are meant to have.

Defendant argues that the amount of punitive damages awarded is the result of passion and prejudice on the part of the jury. There is no foundation for this argument except for the size of the award. This fact alone does not support Allied's argument. The evidence before the jury showed that Allied, through its actions, caused the ruination of General Poly. Ten million dollars in actual damages were lost. This entire loss could have been avoided if Allied had carried out its fiduciary duties, and if it had reasonably accommodated General Poly's needs in May and June of 1981. Instead, Allied turned its back on its fiduciary. Allied's posture throughout the trial and to this day is that it committed no wrong; that it had a right to destroy a business if to do otherwise would diminish its own profits. The jury obviously believed such conduct was entirely reprehensible. The jury then had to ask itself what size of an award would get Allied's attention and prevent it from practicing business in this way in the future. In all probability, an award, of say, $6 million, the size of which would destroy many businesses, could be written off as a "business expense" by a company the size of Allied. This jury believed that $60 million, while less than what plaintiff argued for, was what it would take to get Allied's attention and to prevent such action in the future. Such a determination was within the jury's prerogative. I will have more to say on this subject later. I am of no mind to tinker with this award or to substitute my judgment for that of the jury. Simply said, this verdict does not shock my conscience and I commend the jury for its fortitude.

Accordingly, Allied's motion for JNOV on punitive damages is denied.

12. Allied claims that I erred in failing to grant its motion for directed verdict in its entirety.

*Comment and Finding:* I have already addressed substantial evidence that a fiduciary existed between these parties and that there was a breach of the duties. Therefore, Allied was not entitled to a directed

verdict on the breach of fiduciary duty claim. Thus, Allied is not entitled to JNOV.

13. Allied claims that the jury verdict was against the weight of credible evidence.

*Comment and Finding:* Again, the facts in support of the jury verdict have been discussed and this ground for JNOV is denied.

14. Allied claims that the evidence established as a matter of law that there was no fiduciary relationship; that there was no breach of fiduciary duties; that General Poly's losses were not caused by Allied's conduct.

*Comment and Finding:* Each of these contentions by Allied has been previously discussed, and this ground for JNOV is denied.

*Motion for New Trial*

I will now address defendant's motion for new trial. It consists of 92 paragraphs and is comprised of several hundred objections to my rulings. The motion is not structured or organized in any particular fashion. It appears to be rather disjointed, rambling and redundant.

1-3. In each of grounds 1 through 3 Allied objects to Instruction 8. Allied argues that Instruction 8, the contentions of the parties, was misleading, incomplete, needlessly confusing, and failed to focus the jury's attention on relevant issues or to identify instances of possible wrongful conduct. The instruction should not have contained the claims upon which a verdict was directed unless the court explained the significance of the directed verdict. The instruction should have instructed the jury on which "facts" as to Allied's conduct could have constituted a breach of fiduciary duty. The court improperly excluded the following portions of Allied's proposed contentions: that General Poly could have restored its credit by paying its past due balance of $180,000; General Poly could have continued in business with additional investments of new capital; the damages claimed by General Poly were not within the contemplation of the parties; the witnesses' statements as to lost profits were speculative, conjectural and based on assumptions contrary to the evidence; the dilemma that General Poly

needed to be able to establish that it had borrowing power in order to substantiate the claim that it indeed lost profits versus the need to prove that it didn't have borrowing power in order to prove that it could not have avoided its damages by additional borrowings; and no notice of a claim of breach of fiduciary duty was given to Allied. The court further failed to frame factual issues for determination of moral culpability for determining punitive damages.

*Comment and Finding:* During the instruction conference, I heard objections to Instruction 8, the parties' contentions. At page 5701 of the transcript I overruled defendant's objections to this instruction.

I have again reviewed this instruction and find that it accurately, while simply, sets forth the parties' contentions. This instruction is designed to help the jury understand what it is each side tried to prove, and what it is each side would like for the jury to believe. The instruction specifically reminds the jury that the contentions are not the law of the case and are not to be considered as such. The remainder of the instructions correctly advised the jury on the law to be applied.

Allied's argument that I should have adopted its lengthy recitation of the significance of my having directed a verdict on many of plaintiff's claims is misplaced. I have consistently made it a practice to set forth in the contentions even those claims on which I have directed a verdict, and then to notify the jury that they will not be considering those specific claims. It is my belief that this eliminates much confusion from the jury, rather than adding to their confusion as Allied argues. In my view, such a procedure lends perspective as to where the jury has been and where it is going.

Further, contrary to Allied's argument, in determining whether or not there was a fiduciary relationship between the parties, the jury was to consider *all* evidence as to any dealings between these parties, and the jury was so advised in Instruction 10. Thus, Allied's proposed additional contentions as to the "true meaning" of the directed verdict would have misled the jury as to what evidence it was to consider.

Allied's argument that I committed error by excluding certain of its factual contentions is without merit. The jury was expressly instructed

that in order to award lost profits it must find the same to have been within the contemplation of the parties, and this did not need to be contained in the contentions. Allied's requested contention that the plaintiff's expert witness testimony was speculative was a question of law for the court's determination and did not need to be included in the contentions. Any further factual contentions of Allied which were eliminated were either redundant or beyond the scope of the evidence. Further, Allied was not prejudiced by the elimination of any of these factual contentions that it might have wanted to include.

Allied would also have had me include in the contentions a factual framework for determining moral culpability for purposes of punitive damages. As has been explained, the jury was entitled to award punitive damages if it found there was a breach of fiduciary duty. Thus, Allied's argument in this regard is misplaced.

Allied's motion for mistrial on grounds 1-3 is overruled.

4. Allied claims that I erred in giving an incomplete characterization of the fiduciary concept in Instruction 10 and by refusing Allied's requested instructions on fiduciary relationships. Allied makes 10 objections in this regard and I will address each in turn. However, before turning to the specific narrow objections, I must note that Allied has seemingly overlooked and ignored what I said to the jury in Instructions 10 and 11, which address the definitions of a fiduciary relationship and duties pertaining thereto. They are recited here as follows:

INSTRUCTION NO. 10

> As stated, plaintiff claims — and defendant denied — that at all times material hereto the litigants were exercising their agreement to jointly develop resin as fiduciaries, rather than as the traditional buyer and seller. While any contract, or agreement, between parties implies that each party will act in good faith toward the other, a fiduciary relationship implies even higher duties. These so-called fiduciary duties will be defined in the next instruction. You are first asked to determine whether such a relationship, that is, a "fiduciary relationship", existed between these parties.

In this regard, a fiduciary relationship exists where there is special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.

Whether or not a fiduciary relationship exists between two parties depends solely on the facts and circumstances in that individual case. A fiduciary relationship may exist under a variety of circumstances and does not depend upon some technical relation created by, or defined in, law, nor do the parties have to have some kind of written agreement in order to be fiduciaries. The relationship may arise out of conduct of the parties evidencing an agreement to engage in a joint undertaking for the mutual benefit of the parties; or it may arise from an attitude of trust and confidence based upon an agreement, either expressed or implied, from which the parties intended to create mutual obligations. Mere concert of action, without more, does not establish a fiduciary relationship. Clearly, parties may deal at arm's length for their mutual profit. It is only when, by their concerted action, they willingly and knowingly act for one another in a manner to impose mutual trust and confidence that a fiduciary relationship arises.

You the jury will have to decide whether the facts in this case are such that General Poly and Allied were fiduciaries, or whether they only had a normal commercial business relationship. You may consider all aspects of this relationship which you believe may be relevant in answering this question.

The existence of a fiduciary relationship must be proven by the party asserting it, here General Poly, and it must be proven by clear and convincing evidence.

To be clear and convincing, evidence should be "clear" in the sense it is plain to the understanding and unambiguous, and should be "convincing" in the sense it is so reasonable and persuasive as to cause you to believe it.

INSTRUCTION NO. 11

When a fiduciary relationship exists between parties, the law imposes certain duties upon the parties. Generally stated, neither party may exert influence or pressure upon the other, take selfish advantage of his trust or deal with the subject matter in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with full knowledge and consent of the other. Business shrewdness and hard bargaining are totally prohibited between parties standing in such a relation to each other; they are to deal with each other with the utmost good faith. If plaintiff has fiduciary obligations toward defendant, the defendant in turn has fiduciary obligations toward plaintiff.

In the context of this case, you are instructed that where a fiduciary relationship exists, fair dealing requires that the parties be frank with each other. The parties are entitled to rely upon each other to communicate the true state of facts. Thus, where one of the parties has knowledge of certain facts which are not known and are not readily discoverable by the other party, but which — if known — would better enable him to judge the expedience or reasonableness of their transaction, the party with such knowledge has a legal duty to speak, and his failure to do so is a breach of this fiduciary duty.

Also, a fiduciary owes a duty to reasonably, and in utmost good faith, accommodate the interests and special needs of its colleague and to make concessions, if necessary, when it can do so without undue disruption or prejudice to its own operation. A fiduciary is never to act primarily for its own interests. The failure of the fiduciary to reasonably accommodate the special needs of the other party is a breach of fiduciary duty.

The burden is on the plaintiff to prove that defendant breached a fiduciary duty by the preponderance of the evidence.

I am amused to note that the statement contained in Instruction 11 that "a fiduciary owes a duty to reasonably, and in utmost good faith, accommodate the interests and special needs of its colleague . . ." was

first recited by me during arguments on the directed verdict motion, and defense counsel, Mr. Crowley, concurred that this was a true and accurate statement of the law. (Tr., p. 4552.) Of course, counsel was unaware at that time that this statement would be contained in the instruction or that the issue would ever even reach the jury. In any case, defendant is contending that Instruction 10 and 11 are completely erroneous.

With that said, I will now address the specific objections to these instructions:

(a) That a fiduciary should act primarily for the benefit of another.

*Comment and Finding:* I correctly refused to give Allied's requested instruction that a fiduciary is to act primarily for the benefit of the other. In "traditional" fiduciary relationships, such as trustee/trust, it is clear the fiduciary's responsibility is to act primarily for the benefit of another. But in joint venture situations, or in cases involving confidential relationships, the fiduciaries are bound to act with the utmost good faith and due regard toward the interests of each other, and they are not to act primarily for their own interests. The jury was so instructed in this case. However, in the joint venture type situation, the parties must clearly continue to act for their own self interests in addition to the interests of the other. *Carter Equipment Co. v. John Deere*, 681 F.2d 386 (5th Cir. 1982). Here, the jury was instructed that "a fiduciary is never to act *primarily* for its own interests." (Emphasis added.) This is a correct statement of the law. Thus, to have instructed the jury that the fiduciary must act primarily for the benefit of another would have been misleading and erroneous.

(b) That a fiduciary relationship must be based on some form of agreement.

*Comment and Finding:* In Instruction 10 the jury was indeed instructed that there must be some form of an agreement, whether it be express or implied. The law of Kansas is that a fiduciary agreement may be implied and that it may be shown by the actions and conduct of the parties rather than any express agreement. *See Paul v. North*, 191 Kan. at 170.

I further clarified the law of Kansas as to fiduciary relationships and how they are formed when the jurors asked the following question:

> "Can you please clarify for us: 'mere concert of action, without more, does not establish a fiduciary relationship. It is only when by their concerted action, they willingly and knowingly act for one another in a manner to impose mutual trust and confidence that a fiduciary relationship arises.' Maybe we are trying to read too much into this."

When this question was received, defendant requested that the court instruct the jury that "a party can only be charged with fiduciary duties if it has consciously and knowingly accepted those duties." (Tr., p. 5855.) In essence, defendant would have had the jurors believe that in order for parties to have a fiduciary relationship they must have shaken hands and said, "let's be fiduciaries," or signed a written agreement stating that they would be fiduciaries. This is not the law in Kansas. Moreover, this statement did not answer the specific question asked by the jury. Thus, I gave the following response to the question asked:

> "In my view, these sentences are not contradictory and perhaps you are letting the words 'concert of action' and 'concerted action' confuse you. The sentences are intended to mean that merely acting as a traditional buyer/seller is not enough. However, if a concerted action is undertaken in the manner whereby each party willingly and knowingly acts for the other in a manner to impose mutual trust and confidence, then a fiduciary relationship arises."

This was a correct statement of the law in that the jurors could find the parties had a fiduciary relationship by the nature of the parties' agreement and their actions toward each other. They could then conclude that a fiduciary relationship was implied in the parties' agreement. There does not need to be an express agreement that the parties have entered a fiduciary relationship.

Therefore, I correctly refused to instruct the jurors that there needed to be an express agreement.

(c) That I erred in refusing to instruct that before one can be charged with fiduciary responsibilities he must consciously agree to accept those responsibilities.

*Comment and Finding:* In Instruction 10 the jury was instructed that in order to be fiduciaries the parties must "willingly and knowingly act for one another in a manner to impose mutual trust and confidence." Again, this is a correct recitation of the law of Kansas in that a fiduciary relationship may arise out of the conduct of the parties toward each other evidencing an implied agreement to be fiduciaries. Once such a relationship exists, certain duties follow as a matter of law. Just as an express agreement to be fiduciaries is not required, a conscious statement that one does accept fiduciary responsibilities is also not required.

Allied is overruled on this point.

(d) That I erred in refusing to instruct on "familiar examples of fiduciaries and fiduciary relationships."

*Comment and Finding:* In Allied's requested Instruction G, defendant gave examples of traditional, contractual fiduciary relationships, such as trust and trustee, and partners to a partnership.

Such an instruction was not required in defining fiduciary relationships, and would have served only to confuse the jury. As has been explained, the fiduciary relationship between Allied and General Poly falls into a second class of fiduciary relationships which are not specifically created by contract.

Allied's objection is overruled.

(e) That I erred in refusing to instruct that a fiduciary must either have custody or control of another party's property or be involved in the handling or management of another party's business or personal affairs.

*Comment and Finding:* There is no requirement under Kansas law that a fiduciary must have control or custody of another's property, and Allied's objection is overruled.

(f) That I erred in refusing to instruct that the trust and confidence required to form a fiduciary relationship is of a higher order than the trust and confidence typically reposed between parties in ordinary business relationships.

*Comment and Finding:* My Instruction 10 accurately reflects the level of trust and confidence required to form a fiduciary relationship. It specifies that it must be of a higher degree than between parties in a commercial setting. The supplemental instruction, in answer to the jury's question, stressed that a traditional buyer/seller relationship is insufficient to justify imposition of fiduciary obligations. Thus, Allied's objection is overruled.

(g) That I erred in refusing to instruct that the trusted party must have a position of superiority over the entrusting party.

*Comment and Finding:* A "position of superiority" is a by-product of the trust and confidence that each fairly reposes in the other. If one party — such as Allied here — conceals certain facts crucial to the relationship, Allied naturally is in a "position of superiority" due to its knowledge. This language was not required to be included in the instruction itself. Therefore, Allied's requested Instruction I was correctly refused.

(h) That I erred in refusing to instruct that in order to find a fiduciary relationship the jurors must conclude that the relationship between Allied and General Poly was free from the usual tensions and conflicts between buyers and sellers in a commercial setting.

*Comment and Finding:* Such an instruction would have been redundant. The jury was clearly instructed that a fiduciary relationship was one different from a usual buyer/seller relationship. Adding needless, repetitive instructions is only a means by which to confuse the jury. Allied's objection is overruled.

(i) That Instruction 10 uses erroneous criteria in defining fiduciary relationship.

*Comment and Finding:* I believe Instruction 10 is a correct recitation of Kansas law as applied to the facts of this case. Allied's objection is overruled.

5. Allied claims that I erred in refusing to instruct on the significance of its directed verdict rulings.

*Comment and Finding:* I have previously addressed my reasons for not including Allied's requested lengthy recitation of the significance of the directed verdict rulings. This objection is overruled.

6. Allied claims that I erred in refusing to give defendant's requested instruction explaining the significance of the directed verdict ruling.

*Comment and Finding:* This objection is merely redundant. I correctly refused Allied's misleading instruction in this regard.

7. Allied claims that I erred in failing to instruct that the jury must find breach of fiduciary duties by clear and convincing evidence.

*Comment and Finding:* The law of Kansas requires that a plaintiff must establish the *existence* of a fiduciary relationship by clear and convincing evidence. *Wolf v. Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974); *Paul v. North*, 191 Kan. at 170. The jury was accordingly so instructed. There is *no* requirement that breach of fiduciary *duties* must be established by clear and convincing evidence. Therefore, I correctly instructed the jury that the usual preponderance of the evidence standard must be used in finding breach of duties. Allied cites no law to the contrary. Allied's objection is therefore overruled.

8. Allied claims that I erred in refusing to instruct the jury that it was to presume Allied acted fairly and honestly.

*Comment and Finding:* While any defendant is entitled to a presumption of innocence, this presumption is embodied in the plaintiff's burden of proof. Therefore, the defendant was not entitled to a separate instruction stating that it was presumed to have acted honestly and fairly. Allied cites no authority requiring such an instruction. Such an instruction simply would have been redundant and confusing. Allied's objection is thus overruled.

9. Allied claims that I erred in refusing Allied's requested Instruction L that breach of fiduciary duty can only be found in conduct resulting in obtaining of undeserved gain or benefit.

*Comment and Finding*: Such an instruction was not required, was redundant, and I was correct in refusing it. Allied's objection is overruled.

10. Allied claims that I erred in failing to give Allied's requested Instruction M that the seller is entitled to determine creditworthiness, i.e., to grant or withhold credit on the basis of its own business judgment.

*Comment and Finding*: There was no error in my having refused to give this instruction. Such an instruction is simply an argument of facts. Allied's oojection is overruled.

11. Allied claims that I erred in failing to give Allied's requested Instruction N that any duty to extend credit was suspended by General Poly's failure to pay for earlier purchases.

*Comment and Finding*: Again, I correctly refused to give this instruction because it was merely Allied's argument of the facts. The objection is overruled.

12. Allied claims that I erred in failing to give Allied's requested Instruction O that there is a duty to disclose information only when the fiduciary knows the information is needed by the other party.

*Comment and Finding*: Such an instruction was contained in my Instruction 11, wherein it was stated: "Where one of the parties has knowledge of certain facts which are not known and are not readily discoverable by the other party, but which — if known — would better enable him to judge the expedience or reasonableness of their transaction, the party with such knowledge has a legal duty to speak, and his failure to do so is a breach of his fiduciary duty." This is an accurate statement of the law in Kansas as to fiduciary duty. *See Wolf v. Brungardt*, 215 Kan. at 282. Allied's objection is overruled.

13. Allied claims that I erred in failing to give Allied's requested Instruction P that the only way Allied could be liable for General Poly's damages was if it was the only cause, i.e., the "substantial contribution" instruction was error.

*Comment and Finding*: I have previously addressed this objection, and Allied is overruled.

14. Allied claims that I erred in failing to give Allied's requested Instruction Q that General Poly could not recover damages for lost profits after July 1, 1981, unless it could show it would have stayed in business but for Allied's withdrawal of credit.

*Comment and Finding*: In Instruction 12 the jury was advised that it should find Allied's actions were not a substantial contributing factor to General Poly's collapse if it determined that General Poly would have collapsed despite defendant's breach. Clearly, if the jury believed that General Poly would have been unable to stay in business even if Allied had extended further credit, it would have had to conclude that Allied's conduct was not a "substantial contributing factor" to General Poly's demise. Therefore, Allied's requested instruction is contained within my instructions. Further, there was substantial evidence from plaintiff's witnesses that General Poly indeed could have stayed in business if Allied had not withdrawn credit in June of 1981. Allied's objection is overruled.

15. Allied claims that I erred in instructing (Instr. 13) that the jury could award damages for amounts owed to creditors and the equity investments of General Poly's shareholders. Further error was committed in instructing the jury that lost future profits could be awarded as an additional element of damage rather than as an alternative to an award of damages for the reduced value of the business.

*Comment and Finding*: These arguments have previously been addressed. The objection is overruled.

16. Allied claims that I should have instructed the jury that only Bonin, Heath, and Prince had authority to bind Allied.

*Comment and Finding*: I overruled this same objection at page 5721 of the transcript during the instruction conference. First of all, the instruction was unnecessary. The evidence at trial established that Bonin's conduct resulted in imposition of fiduciary obligations upon Allied. Bonin is the high density polyethylene group general manager

and so had the authority to bind Allied. Moreover, in the recent 10th Circuit case, *Mattingly, Inc. v. Beatrice Foods Co.*, the 10th Circuit discussed when the negligent actions of corporate employees could result in punitive damages being assessed against the corporation. The court noted that the important inquiry is whether the employees have "managerial discretion". Here, any actions taken by Allied employees with regard to General Poly were actions involving "managerial discretion" and as such were sufficient to bind Allied. Additionally, there is some irony here with defendant's argument. In this regard, Mr. Belzer, president of Allied, who signed the very agreement with which we deal, could not assist the defense in this case. At best, this gentleman could recognize his signature with only faint recall of the transaction. Anything he would offer is speculative and he defers to Bonin. (Dkt. No. 651, Disc. Depo., p. 108.) Simply said, this witness was no help at all to his company. His absence from the courtroom and his silence here was not overlooked by this jury. Allied's objection on this point is overruled.

17. Allied claims I erred in allowing the jury to award lost future profits. Allied contends that I committed the following errors with respect to Instructions 13 and 14: failing to inform the jury that lost future profits must be within the contemplation of the parties, i.e., that Allied must have known it was General Poly's only domestic source of resin; refusing to give Allied's requested Instruction B, which would have instructed the jury on plaintiff's duty to minimize damages; failing to give PIK 9.46, stating that lost profits are speculative in the case of a new business; refusing to give Allied's requested Instruction T, which incorporates the 10th Circuit decision in *REB, Inc. v. Ralston Purina Co.*, 525 F.2d 749, stating that lost profits in commercial businesses are generally not allowed as damage; refusing to give requested Instruction U, which would have identified factual assumptions relied on by Roman Weil and instructed the jury that lost profits were awardable only if it found all of those assumption were correct; refusing to give requested Instruction X, which would have disallowed lost profits beyond July of 1983, three years after Allied began making film grade resin.

*Comment and Finding:* I have previously discussed my reasons for allowing the jury to award lost future profits. Allied's objection to such an award is overruled. Further, I believe that Instruction 13 and 14 are fully adequate in explaining the award of lost future profits. In this regard, defendant's objections are not well taken. For example, Instruction 14 does advise the jury that in order to award such damages they must be within the contemplation of the parties: an additional statement, that the only way such damages could have been "contemplated" was if Allied knew it was General Poly's only source of resin, would have been misleading. This is Allied's argument. It is not the law.

I previously addressed my reasoning for not giving the PIK 9.46 instruction. The instruction was properly refused.

I properly overruled Allied's requested Instruction V that plaintiff has a duty to minimize damages. This is a matter of causation, and so is contained in Instruction 12. Following this instruction, the jury could either conclude that Allied's actions caused the collapse of General Poly or not. Thus, had the jury concluded that General Poly itself could have taken steps to survive, it could not have found Allied responsible for General Poly's losses.

At page 5713 of the instruction conference, I overruled defendant's request for an *REB, Inc. v. Ralston Purina* type of instruction, i.e., that lost profits of a commercial business are generally not allowed. I felt such an instruction went to the speculation argument. The jury was instructed that it could not speculate as to damages.

I also properly overruled requested Instruction U which would have instructed the jury that in order to believe Weil's testimony it would have to find that each of his assumptions was correct. To the extent there were any discrepancies in the evidence regarding the assumptions made by experts, those were matters going to the weight of the evidence, as to which Allied had a fair opportunity to conduct cross-examination. Allied was not entitled to a separate instruction on this.

Finally, I correctly refused to instruct the jury that an award of lost future profits should end in July of 1983. I exercised my discretion in

putting a cap on the time for awarding lost future profits. In doing so, I was mindful of the Tenth Circuit's decision in *National Farmers Organization, Inc. v. Kinsley Bank*, 731 F.2d 1464 (10th Cir. 1984). In setting the 3-year limit, I found that based upon the evidence presented, and consistent with the terms of the contract, the parties intended General Poly to have a first right of purchase from three years after the production by Allied of prime resin. Allied did not produce prime resin until June of 1981. Thus, I instructed the jury to award lost future profits for a period of three years from that date. I remain convinced this was an equitable and appropriate decision and allowed the jury to award lost future profits for a period within the parties' contemplation from the outset of the contract.

Accordingly, Allied's objections to the lost future profits instructions are overruled.

18. Allied claims that I erred in authorizing an award of punitive damages in Instruction 15, and that I erred in failing to give Allied's requested Instruction EE, explaining that punitive damages are awardable only for conduct which involves a gross departure from moral behavior.

*Comment and Finding:* The matter of punitive damages has already been discussed and Allied is overruled on this point.

19. Allied claims that I should have instructed the jury that no fiduciary relationship could have existed prior to September 21, 1979, when the written contract was signed.

*Comment and Finding:* This matter has also been previously discussed, and Allied is wrong on this point. The objection is overruled.

20. Allied claims that I should have instructed the jury that the written contract did not create a fiduciary relationship.

*Comment and Finding:* Instruction 10 adequately instructed the jury on all factors to consider in finding whether or not there was a fiduciary relationship. The objection on this point is overruled.

21. Allied claims that I erred in failing to instruct the jury that no relationship could have been formed between Allied and General Poly prior to General Poly's incorporation in February of 1979.

*Comment and Finding:* This matter has been previously discussed and Allied's objection is overruled.

22. Allied claims that I erred in failing to instruct that its conduct during the Peru testing couldn't have been in breach of the fiduciary duty since no fiduciary duty existed.

*Comment and Finding:* This matter has also been discussed and the objection is overruled.

23. Allied claims that I should have advised the jury that conversations between Heath and Traver regarding the purchase of off-spec resin did not create a fiduciary relationship.

*Comment and Finding:* The jury was correctly instructed to consider all elements of the relationship between these two parties. In my view, Mr. Heath's representations classicly corroborate a fiduciary relationship. Allied's objection is overruled.

24. Allied claims that I erred in answering the jury's question of June 15, 1987, by failing to advise the jury that an agreement is necessary and that no one may be charged with fiduciary duties who has not consciously accepted them. I further erred by failing to grant Allied's motion for mistrial following its answer to his question.

*Comment and Finding:* I have previously discussed the "agreement" requirement. Allied's objection is overruled. Further, I correctly denied Allied's motion for mistrial.

25. Allied claims that I erred in answering the jury's question of June 24, 1987, by failing to advise that a fiduciary is someone who has agreed to act primarily for the benefit of another in implying that anything beyond a traditional buyer/seller relationship is a fiduciary relationship.

*Comment and Finding:* Such contentions by Allied have previously been discussed and Allied is overruled on this objection.

26. Allied claims that I erred by failing to clear up the jurors' confusion as to whether an agreement was necessary.

*Comment and Finding:* Again, this is a completely redundant argument by Allied, and Allied's objection is overruled.

27. Allied claims that I adopted the fiduciary theory, then coached plaintiff's counsel, assumed the role of an advocate, and deprived Allied of a fair trial: specifically, by advising plaintiff's counsel to re-examine Traver; by admitting Exhibit 1621, which was Traver's letter to Heath, the exhibit was admitted because it supported the court's new theory of breach of fiduciary duty; and by coaching plaintiff's counsel.

*Comment and Finding:* I have previously addressed and overruled these objections by defendant in the context of the motion for JNOV. Briefly, at page 2828 of the transcript, I did comment by way of allowing plaintiff to continue its examination of Traver, but this was only because I had previously shut down their examination of Traver. When evidence of a fiduciary relationship surfaced, I exercised my powers in equity and allowed plaintiff to pursue this line of questioning. I did not err in doing so. Nor did I err in admitting Exhibit 1621 once there was evidence in the record of the existence of a fiduciary relationship. I am ever certain that when this jury heard Mr. Traver read the letter, it heard about all it needed to support a claim for breach of fiduciary duties. The context of this letter needs to be fully digested and appreciated as it pertains to plaintiff's claim.

As to defendant's objection that I coached plaintiff's counsel, I have previously addressed this. At pp. 2832, 2851, 2854 and 2857, I heard defendant's objections along these lines. At page 2853 I stated as follows:

> I appreciate your objection, but I feel in light of rulings made that I certainly owe it to plaintiff to acquiesce in the state of the evidence as it came out in cross and which, in effect, left open an issue or at least opened an issue that at that point really has not been addressed. I said to you more than once that there was no evidence to support your agreement. It may be there is; I have just not heard it. It's been the reason for my rulings. I garner from

> the letter, exhibit of July 8, to Mr. Heath by Mr. Traver, this agreement, he thought, had been reached, and frankly for the first time it's ever addressed in this case. I simply gave you opportunity to explore it. You have established it sufficient now to at least test that aspect. I have to say I don't know where it leaves us. When we are all finished, we all need to take a look at it to ascertain what it does do.

In light of the circumstances of this case, my comments were not in error, were not prejudicial to the defendant, and were simply a means to discern the truth in the case, and rightly so!

Accordingly, defendant's objections to my so-called "coaching" are overruled.

28. Allied claims that I erred in admitting prejudicial testimony, specifically set forth in the following subparagraphs:

(a) That I erred in admitting testimony regarding General Poly's problems with off-spec resin because there was testimony that General Poly had no other resin; the off-spec resin could be blended with other resin to make a saleable product; the off-spec resin was blended with Hoechst; there were no other economical alternatives; General Poly could cover the cost of raw materials; and General Poly's choice was to buy resin from Hoechst at a premium price or go out of business or blend it with Allied resin and stay in business.

*Comment and Finding*: It was not error for me to admit testimony regarding General Poly's problems with the off-spec resin. Evidence was presented that General Poly agreed to purchase this resin, not only because it could blend it and make a saleable product, but because it would help Allied in getting the resin off its hands and in continuing to work toward development of a prime resin. There was also evidence presented that Allied was aware of the problems General Poly had with its resin. Thus, the evidence was admitted to present the whole picture of General Poly's situation by the time Allied developed the prime resin. The evidence was also relevant insofar as Allied's duty to accommodate its fiduciary once it had developed a prime resin. Thus, at page 2838 of the transcript, I overruled Allied's objection to

Traver's testimony about the problems with the resin. The same objection was made at page 2862 and was overruled.

The factors which Allied suggests contradict that General Poly in fact had problems with the off-spec resin do not contradict it at all. Each of these factors indicates that General Poly was having problems, e.g., it had to blend the resin it was receiving from Allied in order to make a saleable product — rather than being a "boon" to General Poly, this was a lengthy and expensive process.

Allied's objection to the admission of this testimony is overruled.

(b) That I erred in admitting testimony from Traver of the harm caused by the off-grade resin because it was irrelevant since General Poly had either ordered this resin or agreed to accept it once it was received.

*Comment and Finding:* This objection is redundant and is overruled.

(c) That I erred in admitting Jack Ranson's testimony that General Poly had a general agreement to pursue a joint venture with Allied. Mr. Ranson was the owner of one of the bonding companies that underwrite the General Poly venture.

*Comment and Finding:* I addressed this objection at page 3095 of the transcript and overruled it. Defendant had argued that this statement was a legal conclusion to an issue in the case. Ranson's statement was not a legal conclusion but was offered only as to what he understood about the parties' undertaking. Whether or not a joint venture existed was not at issue in this case as the court had ruled on this at summary judgment stage. Nor was the statement inadmissible due to hearsay because Walker had previously testified in this case, and the statement was reliable given the circumstances.

(d) That I erred in admitting Ranson's testimony regarding information he received from Wurth on results of the Peru tests.

*Comment and Finding:* I overruled this objection at page 3099 of the transcript. Allied had objected that the statement was hearsay. It was not hearsay because it showed state of mind and was reliable, given the circumstances.

(e) That I erred in permitting the hypothetical question to Ranson as to whether or not he would have gone ahead with the General Poly project had he known the truth about the Peru tests.

*Comment and Finding:* Defendant objected to this hypothetical question at page 3101 of the transcript. I then overruled the objection but had counsel to the bench and announced my reasons for doing so. At that time, I stated in part:

> The question then would be in that [fiduciary] setting here, was the Allied Company in good faith as they proceeded to Peru. Isn't any question in my mind that they were a fiduciary, operating in confidence with their counterpart, in trust with their counterpart, in the quest for a common goal, if that's what a jury should say, they will also be instructed they have a duty to be candid and upright and fair with the General Poly principals. In that setting, what General Poly would have done, had they known that this was not an Allied developmental product, the likes of which "if you contract with us, we will have timely available but rather a solvay product," and the only product they had at hand because at that point in time Allied had developed nothing. If that were known, would Mr. Walker have so quickly moved to Mr. Wurth, to Mr. Ranson to invest, invest his own money, to put it on stream? You can ask him that question, just as you can ask Mr. Ranson now, what would they have done had they known that was the state of affairs.

(Tr., p. 3103-04.) This ruling was correct, and defendant's objection is overruled.

(f) That I erred in admitting hearsay testimony of Ranson regarding discussions with Walker about when they expected to receive Allied resin.

*Comment and Finding:* I overruled the hearsay objection on p. 3115 of the transcript. This statement was reliable, given the circumstances. The parties' objection here is overruled.

(g) That I erred in admitting hearsay testimony of Ranson regarding his discussions with Traver on the quality of Allied's resin.

*Comment and Finding:* This objection was overruled by me at p. 3116 of the transcript. This statement was reliable, given the circumstances. Allied's objection here is overruled.

(h) That I erred in admitting Ranson's hearsay testimony regarding General Poly's attempt to acquire Allied prime resin in May and June of 1981.

*Comment and Finding:* I overruled this objection at p. 3119 of the transcript as I found the statement to be reliable, given the circumstances. Allied's objection here is overruled.

(i) That I erred in admitting Ranson's opinion on the impact on General Poly that no prime resin was available from Allied until June of 1981.

*Comment and Finding:* Defendant made this objection at p. 3120 of the transcript. I allowed defendant to voir dire the witness. At p. 3128 I overruled the objection but had counsel to the bench to explain my reasoning. Some of my comments at that time are relevant here:

> Well, you know, one of the exceptions to permitting hearsay testimony is that when the court finds it's reasonably reliable, and I'm a stickler on hearsay, and when you start with the notion, anything out of this courtroom is hearsay, and certainly if it's offered for the truth of the matter it's hearsay. On the other hand, we're now listening to a witness who's also had his own reasons to be suspect and to test and to prod and to research and to ascertain for himself the propriety of whatever is going on in this venture. He relied on it. And this court and this jury has now heard the whole sequence of events starting from October with Mr. Walker, the communications with Allied, communication with Mr. Traver and what in turn those folks have communicated back to Mr. Ranson. I think it would be prejudicial to deny now a man like Mr. Ranson to tell us what it is they said to him and why, upon which he relied. I think it's reliable and it's in evidence and the jury can hear it.

(Tr., p. 3129-30.) Allied's objection here is overruled.

(j) That I erred in admitting Ranson's testimony that the exchange of rail cars was to involve an increase in the quality of the resin.

*Comment and Finding:* Allied objected at p. 3134 because the question called for hearsay, and I overruled said objection because the statement was reliable, given the circumstances. Allied is also overruled here.

(k) That I erred in admitting Ranson's testimony that he would be willing to enter a new bond issue with Traver and Walker despite General Poly's bankruptcy.

*Comment and Finding:* Allied objected because the answer to the question asked was irrelevant and prejudicial. I overruled the objection at p. 3207 of the transcript. The statement was relevant in that one of the defenses was that General Poly's investors were unwilling to invest further in the General Poly venture. This statement showed that the investors' doubts, if any, were not due to their view of Walker and Traver's business practices. Allied's objection here is overruled.

(l) That I erred in overruling defendant's motion to strike Ranson's testimony.

*Comment and Finding:* At p. 3213 of the transcript, I overruled this objection, stating:

> [I]n substance, Mr. Ranson was saying, in effect, that these principals in concert with Allied were on the move toward reaching an agreement. That was clear to him. He did not say they had an agreement, but that it was clear to him that they were pursuing one I think was his term and that was my memory. As to what Mr. Ranson's perceptions are of the principals I think it is entirely relevant as to how he saw as he was witnessing this movement toward developing resin and high molecular resin and his interest in it and his confidence in these kind of people was all important to him, and seems to me that's for the jury to hear and weigh as they in turn come to grips with what is this agreement between these two, which they'll have the opportunity to test in time.

Allied's objection here is overruled.

(m) That I erred in admitting testimony of Peter Barber regarding the quality of Allied resin and its effect on General Poly.

*Comment and Finding:* I overruled defendant's objection to this testimony at page 3238 of the transcript, and Allied is again overruled here.

(n) That I erred in admitting testimony of Barber regarding the price of high molecular weight resin in 1985, 1986 and 1987 without showing the corresponding effect of finished product prices.

*Comment and Finding:* At trial, defendant objected to this testimony only on relevancy grounds. No objection was made regarding the need to show the corresponding effect on finished product prices. I overruled the relevancy objection but did not have an opportunity to rule on the objections now being made. Allied's objection here is overruled.

(o) That I erred in admitting the testimony of Mark Seck concerning the performance of Allied off-spec resin.

*Comment and Finding:* At p. 3298 of the transcript, I overruled Allied's relevancy objection. The relevancy of such testimony has previously been discussed. Allied is again overruled here.

(p) That I erred in admitting Seck's testimony that no European Hoescht resin was available in October, 1980.

*Comment and Finding:* Allied objected, and I overruled the same at p. 3303 of the transcript. Again, Allied is overruled here.

(q) That I erred in admitting Seck's testimony regarding the performance of Allied's off-spec resin in the fall of 1980.

*Comment and Finding:* Allied made the objection and it was overruled at p. 3306 of the transcript. It is again overruled here.

(r) That I erred in admitting Seck's testimony regarding the resin supply situation at General Poly in July, 1981.

*Comment and Finding*: At pp. 3316-17 of the transcript, the defendant objected that Seck's testimony was hearsay. I overruled the objection; I would also note here that Seck's testimony involved only statements he had made. It did not involve statements made by anyone else. Allied is overruled here.

(s) That I erred in admitting testimony of John Wronkowski regarding the method used by Hoescht to test and evaluate resins.

*Comment and Finding*: Allied's objection was overruled at pp. 3442-44 of the transcript. Wronkowski was qualified to give this testimony. Allied is again overruled here.

(t) That I erred in admitting Wronkowski's testimony regarding procedures for testing and evaluating resins at other locations.

*Comment and Finding*: The same is addressed above. Allied is overruled.

(u) That I erred in admitting testimony of Don Wurth regarding his involvement in the financing of Vinylplex, Mr. Walker's previous business, wherein Allied assisted in the financing, all "on a handshake." Mr. Wurth is another underwriter who took part in the financing of General Poly.

*Comment and Finding*: Allied objected to the relevancy of this testimony at p. 3461 of the transcript and I overruled the objection. It is again overruled here.

(v) That I erred in admitting Wurth's testimony regarding his thought process as to the resin supply following the Peru test.

*Comment and Finding*: Allied made its objection and was overruled at p. 3470 of the transcript. The testimony was highly relevant and was not hearsay. Allied's objection here is overruled.

(w) That I erred in admitting Wurth's testimony regarding his conversations with Walker about the Peru test.

*Comment and Finding*: Allied objected that the question called for hearsay at p. 3472 of the transcript, and the objection was overruled.

The testimony was admissible to show his state of mind, and was reliable, given the circumstances. Allied is again overruled here.

(x) That I erred in admitting Wurth's testimony regarding whether they would have gone ahead with the IRB issue if the truth had been known about the Peru test. That I then erred in refusing to allow Allied to ask Wurth whether it would have mattered if he had known Allied had a license to make the resin that was tested in Peru.

*Comment and Finding:* First, I overruled the objection as to relevancy of what Wurth would have done had he known the truth about the Peru test (Tr., p. 3473). I did not err in doing so and Allied is overruled on that objection here.

Second, at p. 3498 of the transcript, I sustained plaintiff's objection to allowing Allied to ask Wurth whether it would have mattered if he had known Allied had a license to make the Solvay resin. I ruled that the question was irrelevant because evidence of the license was not yet in the record; moreover, even if it had been, the license was not one to manufacture and market the product. Allied merely had a license for the catalyst. Therefore, I held the question was irrelevant. This holding was not in error, and Allied's objection is overruled here.

(y) That I erred in admitting Wurth's testimony regarding types of institutions and people who purchased the industrial revenue bonds; that such testimony was prejudicial.

*Comment and Finding:* At the time this question was asked, Allied objected that the question was irrelevant. (Tr., p. 3478.) I overruled this objection; however, Allied now objects that the question was prejudicial. I did not have an opportunity to rule on this objection at the time, but would have overruled such an objection had it been made. Allied is overruled here.

(z) That I erred in admitting the testimony of Edward Hennessy regarding his philosophy of management.

*Comment and Finding:* Defendant's objection is found at p. 3514 of the record; at that time, during a bench conference, I requested plaintiff to explain its line of questioning and what it intended to show.

Plaintiff responded, "This particular part is directed toward the motivations that were in existence of the company and specifically with Baton Rouge that they were under — they had not spent sufficient money on research and development and thus they were putting high pressure on the development of new products and setting about the motivation for the advance that took place." Based on this representation, I overruled the objection and allowed the witness to testify. Allied's objection here is overruled.

(aa) That I erred in admitting plaintiff's Exhibit 240, an internal Allied document identifying film resin as potential strong growth area.

*Comment and Finding:* At p. 3520 of the transcript, the defendant objected as to relevancy. I overruled the objection, and likewise it is overruled here.

(bb) That I erred in admitting the discovery deposition of Allied's president, Alan Belzer, to the effect that Allied occasionally worked with customers in arranging financing.

*Comment and Finding*: At p. 3539 of the transcript, Allied objected on the ground of relevancy. I overruled the objection and it is again overruled here.

(cc) That I erred in admitting testimony of Jim Crupper regarding Podolak's abilities as a salesman.

*Comment and Finding:* Allied objected to the relevancy of the question at p. 3586. The objection was overruled. Podolak's abilities had been brought into issue by defendant's contentions. As such, the testimony was relevant, and Allied's objection here is overruled.

(dd) That I erred in admitting Crupper's testimony regarding the reason General Poly was unable to supply sufficient volume of can liners.

*Comment and Finding:* At page 3588 of the transcript, defendant objected to the question. The objection was overruled. At page 3589, a second objection was made as to hearsay and I sustained the objection. Accordingly, Allied's objection here is meritless and is overruled.

(ee) That I erred in admitting Crupper's testimony regarding the times when General Poly didn't have enough high density resin to run more bags.

*Comment and Finding:* At p. 3593 of transcript, the following colloquy occurred:

> A . . . and there were times when they did not have enough high density resin to run any more bags —
>
> Mr. Behm: Objection, Your Honor, based on hearsay. He would only know if they told him.
>
> The Court: Is that an issue? I'm going to let him answer.
>
> Q (By Mr. Holt) Go ahead, sir.
>
> A We could not get any more high density bags than we were currently selling. Hans Traver and Ed Podolak expressed to me that —
>
> Mr. Behm: Objection, hearsay.
>
> The Court: Sustained.

Allied's objection here is not well taken.

(ff) That I erred in admitting Crupper's testimony as to the impact on his business when General Poly ceased to operate.

*Comment and Finding:* At p. 3594 of the transcript, defendant objected as to relevancy. I overruled the objection. Such testimony went to the issue of damages. Allied is again overruled here.

(gg) That I erred in admitting Crupper's testimony that he would have continued to do business with General Poly after October of 1981.

*Comment and Finding:* At page 3595 defendant objected as to relevancy. I overruled the objection and it is also overruled here. Such testimony was relevant in that there was an issue in the case as to whether General Poly could have continued in business if Allied had supplied resin beginning in May of 1981.

(hh) That I erred in admitting the testimony of Tim Stanton regarding conversations between Walker and himself that Allied would be General Poly's supplier of resin.

*Comment and Finding:* The hearsay objection was made by defendant at p. 3605 and was overruled. The truth of this matter was established. The objection here is thus overruled.

(ii) That I erred in allowing Stanton's hearsay testimony that Allied was to be a principal supplier of resin to General Poly.

*Comment and Finding:* As far as I can discern, the objection here is the same as that of subparagraph hh, and is again overruled.

(jj) That I erred in admitting Stanton's testimony regarding what he was told about the return of hopper cars in June, 1981.

*Comment and Finding:* Defendant made its hearsay objection at p. 3620. The objection was overruled. This testimony was reliable, given the circumstances. Defendant's objection here is overruled.

(kk) That I erred in admitting testimony of Eric Rajala, trustee, as to the total amount of creditors' claims against General Poly: if the debts were intended to represent value of General Poly, then they were double recoveries since the jury was allowed to consider lost future profits; any recovery of the entire value of General Poly could only be based on the theory that Allied was liable for the impairment of General Poly's capital; there was no attempt to show causation.

*Comment and Finding:* At p. 3794 of the transcript, defendant objected to the relevancy of the trustee's testimony. I overruled this objection, stating: "[We're] in the state of the plaintiff's case and I'm going to permit them to proceed through the trustee to show the state of affairs with regard to the claims on file. And I think that's the thrust of his purpose. There will be a time when the plaintiff has rested and it may be some of it will be ruled upon then as to relevancy or admissibility, but I have to hear it until then; . . ." I have since ruled on the relevancy of such testimony and instructed the jury on the proper elements to consider. Allied's objection here is overruled.

(ll) That I erred in admitting plaintiff's Exhibits 1945-D,E,F,G,H, part of the trustee's records.

*Comment and Finding:* At p. 3799 the defendant objected to admission of these exhibits. Before ruling, I clarified that the objection was not to the reasonableness or verification of any of the claims themselves. Rather, the objection was to the relevance of the exhibits and I overruled it. Likewise, defendant's objection here is overruled.

(mm) That I erred in admitting plaintiff's Exhibits 1945-A,B,C, additional records of the trustee, as these were not authenticated.

*Comment and Finding:* Defendant made objection at p. 3811 of the transcript. The objection was overruled and the exhibits were admitted. Likewise, the objection is now overruled.

(nn) That I erred in admitting Exhibits 1945-I,J,K,L, more records of the trustee.

*Comment and Finding:* Defendant's objection was made at p. 3816. I overruled this objection and admitted the exhibits. Likewise, the objection here is overruled.

(oo) That I erred in failing to admonish the jury that these exhibits (mentioned in subparagraphs 11, mm and nn) were not proof of damages.

*Comment and Finding:* At p. 3816 I correctly refused to admonish the jury, as these were indeed elements of damage. Defendant's objection here is overruled.

(pp) That I erred in admitting plaintiff's Exhibits 1945-M,N,O, more records of the trustee.

*Comment and Finding:* At p. 3820 of transcript, defendant objected to these exhibits. The objection was overruled and the exhibits admitted. The objection is also overruled here.

(qq) That I erred in admitting testimony of Randy Apgar as to what General Poly's warehouse manager told him about movement of rail cars in June, 1981.

*Comment and Finding:* Defendant objected to hearsay at p. 3833 and was overruled. This testimony was reliable, given the circumstances. Therefore, defendant is overruled here.

(rr) That I erred in admitting testimony of Bob Rogers as to effect wide spec resin had on General Poly's operation and sales efforts. Such testimony was prejudicial.

*Comment and Finding:* Defendant objected at p. 3890, and the objection was overruled. Such testimony was highly relevant to plaintiff's case. Therefore, the objection here is overruled.

(ss) That I erred in admitting Rogers' testimony regarding the fact that K-Mart would have ordered up to 100,000 lbs. per month of products from General Poly.

*Comment and Finding:* At p. 3906 of transcript, defendant objected to the question as calling for speculation. I invited counsel to the bench; after a lengthy exchange, I allowed the question to be asked with the condition that plaintiff preface it by asking that the witness assume General Poly would in fact have gotten the K-Mart order. Plaintiff then did so preface the question, and the objection of defendant was renewed. At p. 3913 I overruled defendant's objection, stating that I would permit the question for purposes of perspective only, not for a showing that there was, in fact, an order or how much was involved. The ruling was not in error and Allied's objection here is overruled.

(tt) That I erred in permitting Bud Walker, during his recall examination, to testify about the January 10, 1979 meeting: the subject was fully covered on direct; it was outside the scope of cross; the testimony was outside the court's reason for allowing recall.

*Comment and Finding:* The defendant made its objection at p. 3961 of the transcript. Thereafter, a bench conference followed. At p. 3967 I ruled that questions regarding the January 10 meeting could be asked as a prelude to other areas plaintiff wished to go back into, i.e., areas wherein I had previously sustained objections. My ruling was not error and is consistent with my rulings that pertain to a claim of a breach of

fiduciary relationship. In this setting, much of what Mr. Walker attempted to testify to previously is now relevant. Allied's objection here is overruled.

(uu) That I erred in admitting Walker's testimony regarding the need for a domestic supply of resin.

*Comment and Finding:* Defendant objected to this question at p. 3967 of the record; I overruled the objection, again finding that this line of questioning was a preface to further relevant questions. Allied's objection here is also overruled.

(vv) That I erred in allowing Walker to testify on the availability of imported resin.

*Comment and Finding:* As page 3967 of the transcript defendant objected to this question. At page 3968 the objection was overruled. Such testimony was clearly relevant, and Allied is again overruled here.

(ww) That I erred in allowing Walker to testify on what was expected from the Peru test.

*Comment and Finding:* At p. 3968 of the transcript defendant objected. The objection was overruled as the testimony was relevant to the relationship between the parties. Allied's objection here is likewise overruled here.

(xx) That I erred in allowing Walker to testify regarding Bonin's letter of January 23, 1979, which referred to a commitment made at the January 10, 1979 meeting.

*Comment and Finding:* At page 3973 of the transcript, defendant objected that the question was repetitious. I overruled this objection, and likewise Allied is overruled here.

(yy) That I erred in allowing Walker to testify regarding what he was told by Traver concerning results of the Peru test.

*Comment and Finding:* At page 3974 the defendant objected that the question was repetitious and called for hearsay. I overruled the

objection. The statement was reliable, given the circumstances. The objection here is also overruled.

(zz) That I erred in allowing Walker to opine as to what caused General Poly's losses for the period ending December 31, 1980.

*Comment and Finding:* At page 3989 of the transcript, the defendant objected based on qualifications. I overruled the objection. Walker was an officer of the company and was qualified to state such an opinion, if he had one. Therefore, Allied's objection is overruled.

(aaa) That I erred in allowing Walker to testify on what General Poly could have earned in 1980 if it had had prime resin from Allied.

*Comment and Finding:* Defendant objected to this question at page 3989 of the transcript on the ground that it called for speculation and conclusion. After a bench conference, I overruled the objection with some reservations. That is, I pointed out to plaintiff's counsel that Allied had no contractual obligation to have supplied prime resin at that point. However, I permitted Walker to answer in light of the fiduciary claim. My ruling was not in error and Allied's objection here is overruled.

(bbb) That I erred in allowing Walker to give his opinion as to what caused General Poly's loss in the period ending June 30, 1981.

*Comment and Finding:* Defendant objected to this testimony at page 3994. I overruled the objection; likewise, it is overruled here.

(ccc) That I erred in allowing Walker to opine as to what General Poly could have earned had it been receiving wide-spec resin during that period.

*Comment and Finding:* At page 3995 defendant made its objection and it was overruled. Likewise, defendant's objection is now overruled.

(ddd) That I erred in allowing Walker to opine as to whether General Poly could have survived had it received the two replacement cars of prime resin on June 30, 1981, and 500,000 lbs. per months thereafter.

*Comment and Finding:* At page 3999 of the transcript, defendant objected that the question called for speculation and conjecture. After a bench conference, I ruled at page 4001 that Walker could answer the question if proper foundation was laid, i.e., if he took into account all the factors relevant at that time. At page 4003, Walker gave his opinion that General Poly could have survived, after he had taken into account all relevant evidence. At that time defendant did *not* object. The objection of Allied here is overruled.

(eee) That I erred in failing to strike the totality of Walker's testimony on recall.

*Comment and Finding:* Defendant asserted this objection at p. 4005 of the transcript. At p. 4006 I overruled the objection. I allowed Walker to be recalled in light of the emergence of the evidence of the fiduciary relationship. His testimony was highly relevant. Therefore, Allied's objection here is overruled.

(fff) That I erred in admitting Traver's prejudicial testimony that General Poly received no resin from Allied's March, 1981 production run.

*Comment and Finding:* The objection was made by defendant at page 2489 of the transcript. I overruled this objection because such testimony's relevance outweighed any prejudicial effect it might have had. The objection is overruled here.

(ggg) That I erred in admitting plaintiff's Exhibit 1361, which was an article on General Poly written by Allied.

*Comment and Finding:* Defendant objected on page 2967 of the transcript. I admitted the exhibit after finding that it had been signed off by Heath, and that it was relevant as to the fiduciary claim. This ruling was not in error and defendant's objection here is overruled.

(hhh) That I erred in admitting evidence regarding General Poly's problems in making sales of bags to its customers in 1980.

*Comment and Finding:* Defendant objected at page 772. At page 773 I overruled the objection, stating that this was a matter for cross-

examination. My ruling was not in error and Allied's objection here is overruled.

(iii) That I erred in allowing testimony regarding the effect of lack of Allied resin on sales. Defendant argues that such testimony was prejudicial because it was not legally obligated to provide resin.

*Comment and Finding:* At page 771 of the transcript, Allied objected that the statement called for hearsay. The objection was overruled. Allied did not make the objection it now raises here. The objection is overruled; the statement's relevance outweighed any prejudicial effect to defendant.

(jjj) That I erred in admitting Exhibit 2419-A, a 5-year forecast of profits. Such an exhibit was speculative and an improper foundation was laid.

*Comment and Finding:* Defendant made its objection at p. 682. A bench conference followed, at which time I required plaintiff to lay more foundation before it would admit the exhibit. Plaintiff then laid more foundation and the exhibit was offered at p. 689. Defendant again objected and I offered to allow defendant to voir dire the witness. Defendant chose not to do so, and the exhibit was admitted. My ruling was not in error and defendant's objection here is overruled.

(kkk) That I erred in admitting Walker's testimony regarding the Peru test.

*Comment and Finding:* At page 721 of the transcript, defendant objected to the plaintiff's question as being leading and suggestive. I then had counsel to the bench and suggested that the proper objection might be as to relevance. Thereafter, the jury was dismissed and I had counsel in chambers to discuss the relevance of the question. At page 749 of the transcript I ruled to allow this line of questioning but with reservations.

My ruling did not in any way prejudice defendant. In fact, it was I who recognized the grounds for objection. Moreover, once evidence of the fiduciary relationship was introduced, such testimony was

indeed relevant and admissible. Allied's objection here is therefore overruled.

(lll) That I erred in failing to strike Walker's testimony to the effect that General Poly's inability to deliver products to its customers was Allied's fault.

*Comment and Finding:* Defendant objected to relevancy at page 774. I overruled the objection, and likewise it is overruled here. Such testimony was relevant to the issue of causation.

(mmm) That I erred in allowing Walker to testify that General Poly's capital was being depleted; this is an inappropriate measure of damages.

*Comment and Finding:* Defendant objected to this question at page 821. Thereafter a bench conference was held. Following this conference, a second conference was held in chambers. At that point I was having a problem with the relevant time frame and whether Allied had produced any prime resin. At pages 832-33 I ruled that the amount of damages flowing from Allied's failure to deliver resin in 1979 was irrelevant, as it was not required to do so by the contract. I then stated: "What remains for the year 1980 remains to be heard in the evidence. I think it is uncertain at this point when it is that Allied does have their product ready. Some evidence now that it was at least ready by June of 1980. Maybe in-house it was actually ready earlier than that. Maybe this information was imparted to plaintiffs. Some evidence that two orders were made. I don't know how it plays. I think, Mr. Edgar, is what we need is more precise foundation as we proceed henceforth through the year 1980 and 1981. That will be the ruling." Thus, at least at that time, the plaintiff did not re-ask the question now being objected to by defendant. Therefore, Allied's objection here is overruled.

(nnn) That I erred in admitting evidence of the prior relationship between Allied and Vinylplex.

*Comment and Finding:* I overruled this objection at page 388 of the transcript during the reading of Jecha's deposition. I again overruled the same objection at page 561. I again overruled the objection at page

569. Such evidence was relevant to the fiduciary relationship theory. Therefore, Allied's objection here is overruled.

(ooo) That I erred in admitting Walker's testimony regarding Podolak's sales efforts.

*Comment and Finding:* I overruled this objection at page 667 of the transcript, and likewise overrule it here. This testimony was relevant to the issue of causation.

(ppp) That I erred in allowing Walker to testify regarding whether General Poly ever received a resin that conformed with the resin described in Allied's June, 1980 commercial advertisement.

*Comment and Finding:* I overruled defendant's objection at page 813 of the record. This ruling was not error and did not in any way prejudice defendant. Defendant's objection here is overruled.

(qqq) That I erred in admitting Walker's testimony regarding the effect on General Poly of Allied's failure to replace the hopper cars.

*Comment and Finding:* Defendant made its objection at page 871. Following bench conference, the objection was overruled at page 876. I ruled that defendant's objection was something that could be handled on cross-examination. Allied's objection here is overruled.

(rrr) That I erred in admitting plaintiff Exhibit 1795.

*Comment and Finding:* I overruled defendant's objection to the admission of Exhibit 1795 at page 881 of the transcript. The exhibit was a letter from Commerce Bank to Hans Traver, dated September 25, 1981, recalling plaintiff's loans. I did not err in admitting the exhibit and defendant's objection here is overruled.

(sss) That I erred in admitting Walker's testimony regarding his opinion as to why General Poly sustained losses in 1980 and 1981, and ultimately failed.

*Comment and Finding:* At page 891 of the transcript, defendant objected to the question. I overruled the objection and let Walker testify because "he's the chief executive officer of the company and he

ought to be able to express his opinion." When Walker expounded on his answer and said that General Poly had been lied to by Allied, I sustained the objection and ruled that his statements be stricken. Defendant's objection here is overruled.

(ttt) That I erred in admitting Podolak's testimony as to plant capacity, expected payment of resin in July, 1981, average selling price of General Poly's products, and expected income of General Poly. There was no foundation or qualification, his testimony called for speculation, and he was not listed as an expert.

*Comment and Finding:* I have previously addressed Podolak's qualifications to testify in these areas. At trial, defendant's objections were addressed and overruled by me at pages 4233, 4236, 4239, 4241, 4243, 4259-62. At page 4260, I made the following comments which are relevant here:

> As to Mr. Podolak, I have to say to you that again I don't know your cases. Probably as a layman, I envision Mr. Podolak here for color for what he's worth: a football player who's drawn into the company and perhaps drawing upon his good name to assist in the expansion of sales. It's a good example of why a judge should just not draw such conclusions but await the evidence. Mr. Podolak is all of that and insofar as a well known, popular, superb athlete and his name in Kansas is known by anyone probably but I don't think I have to tell you, Mr. Crowley, this gentleman is also a very mature, intelligent, well educated person, well versed in business, and particularly this business, and he knows it and he can articulate it like the back of his hand. And as an officer in the company and an investor to the extent of about $250,000, it certainly is in his interest that he knows all he needs to know about this business, and, in my view, his testimony was most relevant to this case. Mr. Podolak filled some vacuums that have concerned me with regard to the state of the market, not only the fact that General Poly had markets but what is it that they could do with it? In other words, how do you convert 500,000 pounds of resin into whatever number of bags and come out with the net sufficient to survive? Mr. Podolak has done his home-

> work and Mr. Podolak has answered those questions quite clearly and fully and persuasively. I should think, to be sure, you have your work cut out when you address Mr. Podolak in cross-examination. You say he's an undesignated expert. I don't believe that a vice president of a company in charge of sales with an investment that he has in the company and his knowledge in the company as such an officer needs to be designated as an expert. I think you should contemplate that such a witness is a very appropriate witness and a proper witness to put in place his expertise, understanding as to how this company operated and how it functioned and how it could have functioned. That's what I think Mr. Podolak is saying.

(Tr., pp. 4260-61.) Defendant's objection to Podolak's testimony is overruled.

(uuu) That I erred in admitting plaintiff's Exhibit S-187 (a chart on economic forecasts). The exhibit was based on conclusion, conjecture and speculation.

*Comment and Finding:* Defendant objected to this exhibit at page 4243. The objection was overruled and the exhibit admitted. Defendant's objection here is likewise overruled.

(vvv) That I erred in failing to strike Podolak's testimony as prejudicial.

*Comment and Finding:* For all the reasons previously discussed, this objection is overruled.

29. Allied claims that I erred in interrupting defendant's cross of Walker and in suggesting to the jury that it was improper.

*Comment and Finding:* Following the emergence of the fiduciary theory, I allowed plaintiff to recall Walker in order to cover areas which the court had previously precluded plaintiff from going into. During the cross-examination of the recalled witness, the following colloquy occurred between Mr. Beck and Mr. Walker regarding Walker's memory of the January 10, 1979 meeting:

Q You have been conferring with your attorneys regarding strategies in this case, isn't that true?

[Objection omitted.]

A We talk about the case, yes, sir.

Q And you have discussed how the testimony goes and what testimony perhaps may be needed in this case?

[Objection overruled.]

A I don't know about testimony that is needed. We discussed the case. We discussed the testimony. We discussed the case. We are staying in the hotel together and we talk about the case.

Q Okay. And this has been going on for three or four weeks, has it not?

A Six weeks.

Q Six weeks. All right. And my question, Mr. Walker, is you fully testified in your direct examination regarding the conversations. What has taken place since that that has caused you suddenly to remember all of the additional comments that you have now testified to here this afternoon?

(Tr., pp. 4009-10.) Following this questioning by Mr. Beck, I interrupted because it was me who had authorized the recall. At that time, I made the following statement to the jury:

Since you put the question, I will tell them why. I have authorized this witness to be recalled for reasons that were involved in the evidence that had to do with the test of what is called a fiduciary relationship that may exist between the parties. A fiduciary relationship in a very general way is a position of trust or confidence, mutually imposed between the parties, a claim of the plaintiff but not necessarily articulated in the plaintiff's case as was the claim of a breach of contract between the parties. In the course of testimony through the plaintiff's case, as to a question put to this witness and as a question put to

> Mr. Traver, I had sustained objections because, in my view as of that moment, the evidence is lacking to establish a breach of contract under certain requisites of law, and yet on the strength of the evidence, it struck me that the claim of a fiduciary relationship may have surfaced. At some point when the jury is instructed, I will give you full instructions on the question. If so, the burden of the plaintiff will be to persuade you by clear and convincing evidence that such a relationship exists. That remains to be seen when this case is fully completed. But there should be no confusion as to why Mr. Walker was authorized to be recalled. I had no permitted him to testify at one point to the question, particularly: "And why did this company collapse?" When the other evidence came to light, which will be for you to weigh at the appropriate time, I thought he was entitled to have the question put again should the jury find that a fiduciary relationship does in fact exist between the parties. That's the answer to that and the witness needn't explain it. If you ask the question, Mr. Beck, in the presence of the jury, jury is entitled to know why he was recalled.

(Tr., pp. 4011-12.) My comments were not prejudicial to defendant but were beneficial to the jury. There are times in a trial of this length when the jury needs to be reminded of where they are going and what they are looking for. Mr. Walker was put on the stand for a second time due to my own ruling. Defendant's question was argumentative, and was intended to make Walker's recall look as though it were designed to fill in holes in plaintiff's case, and further, that his testimony might in fact be fabricated. This was not the case and the jury was entitled to clarification. The absence of such clarification by me would have prejudiced the plaintiff. Defendant's objection here is overruled.

30. Allied claims that I erred by sustaining plaintiff's objection to defendant's cross of Walker when defendant asked Walker why he didn't relate certain information regarding the January 10, 1979 meeting the first time he was on the stand.

*Comment and Finding:* As stated in response to No. 29 above, the defendant's counsel's question was argumentative, and therefore, I sustained plaintiff's objection. Allied's objection here is overruled.

31. Allied claims that I erred in my comments to the jury during the course of Walker's cross. "The court by its comments in the presence of the jury became a witness for Mr. Walker to establish his credibility." I further erred by failing to give defendant's requested clarifying instruction.

*Comment and Finding:* In response to ground No. 29 above, I gave my reasoning for giving the instruction to the jury. Defendant's objection in this regard is overruled. At page 4032 of the transcript, the defendant requested that I give the following instruction:

> Last Wednesday, just before we broke, Mr. Beck asked Mr. Walker the following question concerning Mr. Walker's testimony about the January 10, 1979 meeting with Mr. Traver, Mr. Bonin and others: What has taken place since you testified the first time in this trial that has caused you suddenly to remember all of the additional comments that you have now testified to here this afternoon? You may recall that I answered that question for Mr. Walker by informing you of the reasons why I had permitted Mr. Walker to be recalled. I did so because I believed Mr. Beck was asking Mr. Walker why he was allowed to be recalled. Upon review of the record, I now realize that I misunderstood Mr. Beck's question. He did not ask why Mr. Walker was allowed to be recalled but why, according to Mr. Beck, he testified last Wednesday to additional details about the January 10th meeting which he had not testified about the first time he took the stand in this trial. Furthermore, my review of the record reveals that no ruling I made during Mr. Walker's initial testimony prevented him from testifying fully at that time regarding the events of January 10, 1979, and on other occasions. Mr. Beck's question therefore was a proper one and he did nothing improper by asking it.

(Tr., pp. 4031-32.) This proposed instruction was not given by me, and I did not err by not giving it. The proposed instruction was totally self-

serving and did not reflect my purpose in giving the clarifying instruction. However, I did not wish to make it appear to the jury that Mr. Beck had done anything "wrong". Therefore, I gave the following statement to the jury when the next morning session began:

> "You may recalled last Wednesday at the last hearing Mr. Walker had been recalled to the stand. I interrupted the cross-examination and at which time I explained in part certain reasons for the recall. On reflection, it may appear that my interruption of Mr. Beck's cross would appear as if I disrupted his cross. There was no intention whatsoever in my doing so, nor should any action on my part in that setting in any way reflect upon Mr. Beck or his cross-examination with Mr. Walker. Those are just my observations that come to mind after the fact and I thought I owed it to Mr. Beck to say so."

(Tr., p. 4042.)

Thus, any prejudice to the defense by what appeared to be my "chastisement" of defendant's counsel was dealt with by this statement to the jury. As such, defendant's objection here is overruled.

32. Allied claims that I erred by denying defendant's May 11 motion for mistrial. The grounds were as follows: (a) that I coached plaintiff's counsel; (b) that I gave advisory opinions to the plaintiff; (c) that I created a new cause of action; (d) that I submitted testimony concerning General Poly's problems with Allied's off-spec resin; (e) that the fiduciary relationship theory was never submitted to discovery; (f) that I refused to allow cross-examination of Wurth as to whether he would have proceeded with the General Poly project if he had known Allied had a license for resin tested in Peru; (g) that in an earlier chambers conference I had indicated that I would allow defendant to ask Wurth such a question, but then did not; (h) that I admitted evidence of plaintiff's losses even though causation was never established.

*Comment and Finding:* This motion for mistrial came at page 3555 of the transcript. I heard defendant on the motion. Then, at pages 3564-71 I stated my reasons for overruling the motion. Each of the

"grounds" for mistrial have previously been addressed by me in regard to defendant's motion for judgment notwithstanding the verdict or the motion for new trial. I do not need to again reiterate my reasoning. Defendant's objection here is overruled.

33. Allied claims that I erred in sending to the jury room, during its deliberations, the plaintiff's chronology of relevant events

*Comment and Finding:* The plaintiff's chronology, used during its final argument, summarized only those facts in evidence. It is my practice to allow the jury to have demonstrative aids if I feel they will be helpful in deliberations. Defendant was not in any way prejudiced by the jurors' use of this chronology, and certainly, even if there was error (which there was not), it would hardly support a motion for mistrial. Defendant is overruled.

34. Allied claims that I erred in admitting privileged communications between Bonin and Allied's law department regarding threatened litigation by General Poly.

*Comment and Finding:* Allied here is referring to two memoranda dated July 24, 1981 and July 29, 1981, from Bonin to Allied attorney Marty Cohen (Pl. Ex. 1654, 1663). While these documents may have at one time been privileged, Allied waived any privilege it had to these documents during the discovery process. Allied produced copies of these memos to plaintiff's counsel, despite the existence of an interim protective order which allowed defendant to screen all documents requested by plaintiff in order to determine whether any of the documents should be protected and not produced by reason of the attorney/client or work product privilege. At that time, defendant asserted no privilege to Bonin's memos. Therefore, Allied's knowing production of these documents waived any privilege. *W. R. Grace & Co. v. Pullman, Inc.*, 446 F. Supp. 771, 775 (W.D. Okla. 1976) ("One cannot produce documents and later assert a privilege which ceases to exist because of the production.") These documents were properly admitted and Allied's objection here is overruled.

35. Allied claims that the verdict of the jury was against the weight of the evidence.

*Comment and Finding:* I will defer comment on this ground for new trial until I have completed discussion of the remaining motions and my rulings.

36. Allied claims that I erred in allowing plaintiff to read excerpts of depositions: (a) the portions read were not "admissions" pursuant to Rule 801(d)(2); (b) Jecha, Singleton, Snell, Wiley and Drury were not "managing agents" pursuant to Rule 32(a)(2); and (c) all of these witnesses were available.

*Comment and Finding:* Plaintiff's counsel opened the case with the engagement of a rather provocative but innovative trial technique. Here, ostensibly as admissions, plaintiff offered excerpts from discovery depositions of a host of defendant principals. These included the likes of Mr. Singleton, defendant's national account manager; Mr. Jecha, a regional sales representative; Mr. Snell, defendant's technical service engineer who was here to develop HDPE resin for Allied; Mr. Prince, the technical director of HPDE for Allied; Mr. Wiley, a key salesman for defendant who, in January, 1981, was on the task force for development of this product; Mr. Heath, director of marketing of HDPE; and Mr. Bonin, general manager of HDPE. A full week's time was taken up with this endeavor. At some point in time, I confess to having labeled the practice as an awkward, irritating and risky one for the plaintiff. It was irritating in that the prolonged reading from *any deposition* becomes tedious and boring, at least for me. Additionally, before any decision was reached, I took care to read the entire depositions of each person, a tedious exercise, particularly when I am trying to get the trial under way in a timely manner. It was risky, I thought, because the reading of these depositions put in place the "good news and bad news" insofar as plaintiff's case was concerned. I cautioned plaintiff counsel that such a process could well delete or diminish the requisite foundations they may intend to rely on as pertains to their respective claims. Actually, this proceeding went quite well and served an important role as the testimony of these witnesses identified Allied's historic role and the placement of each actor insofar as his role and responsibility was concerned.

In any event, I fully addressed the deposition problem during trial. The parties were allowed to brief the issue and the court heard arguments on the issue. Allied is now repeating the same arguments it made during trial. However, in this court's view, Allied's arguments are simply wrong. Rule 32(a) of the Federal Rules of Civil Procedure not only provides that depositions may be used at trial in certain specifically delineated situations such as impeachment, unavailability of the witness, and the witness's status as an officer, director or managing agent of a party, but also that any deposition may be used "for *any other purpose* permitted by the Federal Rules of Evidence." Rule 32(a)(1) (emphasis added). The notes of the advisory committee on rules specifically indicate that subdivision (a)(1) of Rule 32 was amended in 1980 to make it clear that a party may read deposition testimony at trial when the testimony constitutes vicarious admissions of a party under Rule 801(d)(2)(D). Thus, if a deposition constitutes an admission of a party under Rule 801(d)(2)(D), it does not matter whether or not the witness is available within the jurisdiction. Further, under Rule 801(d)(2)(D), any statements made by employees during the course of their employment and relating to matters within the scope of their duties and responsibilities are considered vicarious admissions of their employer. *Mackey v. Burke*, 751 F.2d 322, 326 (10th Cir. 1984). I correctly made my ruling for these reasons at page 202 of the transcript.

As indicated, during the course of trial, I thoroughly reviewed all deposition testimony offered by plaintiff before allowing it to be read into evidence. I further protected defendant's interests by allowing defense counsel to read all portions of the depositions they felt needed to be read to put plaintiff's portions in context. There was no prejudice to defendant in this procedure. Allied's objection here is overruled.

37. Allied claims that I erred in admitting evidence of the quality of Allied's resin, as such evidence was irrelevant.

*Comment and Finding:* I have repeatedly addressed this argument by Allied. Such testimony was indeed relevant to the fiduciary claim. Allied's objection is thus overruled.

38. Allied claims that I erred in failing to give a clarifying instruction to the jury regarding the purpose of the testimony as to resin quality.

*Comment and Finding:* At page 328 of the transcript I denied defendant's request for a clarifying instruction. I stated that it was too soon in the case for such an instruction because it was still unclear how the evidence played. My ruling was correct and defendant's objection here is overruled.

39. Allied claims that I erred in pointing out to plaintiff deficiencies in its proof of an agreement because by this I was "[i]mproperly coaching plaintiff and in essence . . . taking on the role of an advocate for the plaintiff."

*Comment and Finding:* The only party who was prejudiced by my comments was plaintiff.

At page 736 of the transcript, I ruled that certain testimony offered by plaintiff was irrelevant. In so doing, I noted that there was no evidence of an "agreement" between Allied and General Poly prior to the written contract. At page 737 Mr. Beck said to me: "Let me say I think you have a very good grasp at this point." At no time did Allied object that it was being prejudiced by my comments. Allied's objection here is completely out of line and is overruled.

40. Allied claims that I erred in allowing plaintiff to conditionally put on evidence regarding whether Allied informed plaintiff of the source of the Peru resin.

*Comment and Finding:* I allowed this conditional offer on page 748 of the transcript. Such evidence was properly before the jury in consideration of the fiduciary duty theory. Allied was not prejudiced by the admission of such evidence, and its objection here is overruled.

41. Allied claims that I erred in allowing plaintiff to examine Walker about the January 10, 1979 meeting and about the Peru test. Allied further argues that in this regard, I "coached plaintiff's counsel as to how to proceed in order to make its case."

*Comment and Finding:* I have previously addressed all such arguments by defendant. Defendant's arguments are again overruled.

42. Allied claims that I erred in allowing Walker to be questioned about the conversation between himself and Bonin regarding the Peru test.

*Comment and Finding:* This is again a redundant argument by defendant. All such evidence was indeed relevant to this case. Defendant's objection is again overruled.

43. Allied claims that I erred in allowing Walker to speculate about what he would have done had he known the true source of the resin tested in Peru.

*Comment and Finding:* Again, this is a completely repetitious argument; it has been addressed; and the objection is overruled.

44. Allied claims that I erred in failing to sustain defendant's motion in limine to exclude evidence of a prior loan transaction between Allied and Vinylplex.

*Comment and Finding:* I have previously addressed the propriety of admitting evidence of this transaction. Arguing that I erred in failing to grant the motion in limine is simply redundant and defendant is again overruled.

45. Allied claims that I erred in overruling defendant's motion for mistrial on the ground that Podolak's testimony was prejudicial.

*Comment and Finding:* This is another redundant argument, it has been addressed by me, and defendant is overruled.

46. Allied claims that I erred in permitting Roman Weil to testify regarding his balance sheet and profit and loss projections for 1981-84. He failed to assume the following facts which were in evidence: (a) Weinstein's testimony that the average price for general Poly's product was 90 cents per lb.; (b) Traver's testimony that he had agreed in 1981 to pay 48 cents per lb. for future deliveries of prime resin; (c) testimony that the highest product level ever reached by General Poly was 500,000 lbs. of resin per month; (d) testimony that Allied's maximum

obligation to General Poly was to deliver 500,000 lbs. per month; (e) testimony that General Poly could achieve projections only by borrowing $1.3 million during the last six months of 1981; (f) testimony that Commerce Bank, as of April, 1981, would lend General Poly no more money.

*Comment and Finding:* I have previously — in the context of this motion — ruled on the defendant's objections here. I will only note further that to the extent there were any discrepancies in the evidence regarding the assumptions made by the expert, those were matters going to the weight of the evidence, as to which Allied had a fair opportunity to conduct cross-examination. Defendant's objections are overruled.

47. Allied claims that I erred in admitting plaintiff's Exhibit 2288-C. Defendant had insufficient time to review this exhibit and the assumptions upon which it was based were unfounded.

*Comment and Finding:* Following an in-chambers conference on this exhibit, I ruled at pp. 4310-11 that the exhibit would be admitted. In doing so, I required plaintiff to clarify any changes made in the exhibit. I also specifically stated that when the clarification was finished, defendant was at "liberty to voir dire the witness on any problems . . . and then I will hear your objection again or your arguments again." (Tr., p. 4311.) When the exhibit was later reoffered, defendant did voir dire the witness. (Tr., pp. 4315-16.) Following voir dire examination, the exhibit was admitted. (Tr., p. 4318.) This admission of the exhibit was not in error and defendant's objection here is overruled.

48. Allied claims that I erred in allowing Professor Weil to opine as to whether General Poly would have been able to generate enough income to survive. Plaintiff failed to lay a proper foundation.

*Comment and Finding:* At page 4322 defendant objected for lack of foundation. I asked if counsel wished to voir dire the witness. Defendant did not wish to do so. I overruled the objection. Likewise, defendant's objection here is overruled.

49. Allied claims that I erred in failing to defer cross-examination of Podolak and Weil in order to give defendant time to prepare.

*Comment and Finding:* At page 4255 of the transcript, defendant moved that either I strike Podolak's testimony or give defendant a *week* to prepare for his cross-examination and for examination of Weil, or grant a mistrial as to the entire lawsuit. In response, I made the following observation which is relevant here:

> It was my understanding yesterday that counsel for plaintiff correctly apprised the court and you that in light of certain rulings I had made, the thrust of which limited plaintiff's claim for future damages, that the witness [Weil] in turn then had modified his projections. The thrust is not necessarily an update of his report — by that enhancing it or exceeding something which you had, but rather to down date it, if that's the term, and to modify it consistent with my rulings. I'm at a loss to understand how you could be prejudiced with that. As to your opportunities to be apprised consistent with Rule 26, a couple of things you ought to appreciate: you were at liberty from the moment this case starts to have in this courtroom your experts. You are at liberty to share with them daily the daily copy you're ordering so he can be apprised, and I commend that process. In the course of any suit, an expert is entitled to sit in principally as he might perceive the testimony so he can better judge his own expertise and his own opinion, certainly to temper his finding or to modify them and even change them if he is convinced the evidence is such that he should do so. If so, to apprise all parties. It's not uncommon in the course of a case that this occurs. It's my practice when I'm apprised of it, as I was here yesterday, that Mr. Weil will downgrade his testimony, you were apprised of it. If you have any questions with regard to the significance of it or for clarification of just what it is he has to say, you were at liberty to communicate. I suggested yesterday that one of your lawyers depart from the courtroom for that purpose. Seems to me in this setting all you really need is some clarification from the lawyers as to what this holds. But you also had the right to confront the witness, talk to him informally or take his deposition, if need be,

> and you did that. An alternative was to permit him to come on with his cross and have him step down, for you to become more apprised as to — at least evaluate more fully what it is he said and then to depose him if you wanted to. You have taken his deposition. I can't promise you a perfect trial, Mr. Crowley, just a fair one. I do my dead level best to afford that to both sides as fairly and as impartially as I know how. You now have the privilege to address Mr. Weil in the courtroom on cross-examination. You, I'm sure, have taken a full deposition of this witness and know everything there is to know about this person as to who he is, what his background and training and qualifications are, what it is he has at hand to draw the judgments and what are his judgments and why. I'm sure you have done that.

(Tr., pp. 4256-58.) I went on to overrule defendant's objection. The defendant was not prejudiced in this ruling. Allied's objection here is overruled.

50. Allied claims that I erred in allowing Thomas O'Connell to testify on General Poly's competitive advantages. The witness was unqualified to give this opinion.

*Comment and Finding:* I heard defendant's objection at page 4485 of the transcript, and I overruled it, finding the witness to be qualified. Likewise, it is overruled here.

51. Allied claims that I erred in failing to strike O'Connell's testimony that he thought General Poly had a "good case."

*Comment and Finding:* At page 4531 of the transcript, in response to a question by Mr. Cross as to who asked this witness to testify, he stated how it was that he came to testify in the case and that he had concluded "they had a good case." Defendant then moved to strike the last part of his answer. I heard the objection and overruled it. Defendant's objection here is overruled as well.

52. Allied claims that I erred in allowing O'Connell to testify on General Poly's competitive edge when he falsely assumed Allied and General Poly had an oral joint venture agreement as well as the agreement contained in the written contract.

*Comment and Finding:* As addressed in ground No. 50 above, I overruled defendant's objection to O'Connell's qualifications on direct exam. On cross, at page 4512, defendant questioned O'Connell on the assumptions he made in giving his opinion on the competitive edge. Defendant did not thereafter move to strike O'Connell's opinion. Even if it had, I would have allowed it to stand. To the extent any of his assumptions were incorrect, it went to the weight of the evidence. Defendant's objection here is overruled.

53. Allied claims that I erred in admitting plaintiff Exhibits 918 and 919: the June, 1980 commercial advertisement of Allied's prime resin. It was error for me to admit this exhibit because there was no claim that General Poly relied on it and there was no claim for false advertising.

*Comment and Finding:* Following an in-chambers conference in which I heard extensive arguments from both sides, I ruled at pages 805-07 of the transcript that the exhibits would be admitted. My ruling was not in error and defendant's objection here is overruled.

54. Allied claims that I erred in failing to sustain defendant's motion in limine to exclude an unpublished article about General Poly, plaintiff's Exhibit 1364.

*Comment and Finding:* Allied's objection to the introduction of this exhibit is without merit. The story was admissible under the admission exception to the hearsay rule. Rule 801(d)(2)(B) & (C).

55. Allied claims that I erred in failing to strike the false and perjurious testimony of John Wronkowski.

*Comment and Finding:* At page 4900, following the testimony of Sleightholm, defendant moved that the testimony of Wronkowski be stricken because the evidence showed that he had not been hired until January 5, 1981, but had testified to his knowledge of American Hoescht in 1979 and 1980. I overruled the objection. Wronkowski was qualified to testify on the resin evaluation practices followed by Hoescht because he had been a technical service representative of Hoescht for 2-1/2 years. (Tr., pp. 3431-32.) Further, he had worked in the plastics industry in the area of film extrusion for over 20 years.

and he possessed specialized knowledge of industry customs and practices regarding the testing of competitive resins. Thus, his tenure at American Hoescht merely went to his credibility. Defendant's object here is overruled.

56. Allied claims that I erred in permitting plaintiff's attorney to argue all evidence in this case despite my directing of a verdict on most of plaintiff's claims. In this, Allied argues that I allowed plaintiff counsel to mislead the jury and gave no direction as to what evidence it could legitimately consider with respect to the fiduciary issues.

*Comment and Finding:* I have previously extensively discussed this objection. The jury was properly allowed to consider all evidence. Defendant's objection is overruled.

57. Allied claims that I erred in refusing to allow defendant to read certain admissions of Traver.

*Comment and Finding:* At page 5645 of the transcript, defendant proffered certain "admissions" of Traver. I noted the proffer but it was not allowed to be read into evidence. Defendant has not shown how it was prejudiced by this ruling. Allied's objection is overruled.

58. Allied claims that I erred in allowing plaintiff to read excerpts of Traver's deposition.

*Comment and Finding:* I overruled defendant's objections to the reading of the deposition at pp. 5634-37. Again, defendant has failed to show how it was prejudiced by this testimony. Allied's objection here is overruled.

59. Allied claims that I erred in allowing plaintiff to make substitutions of projections of General Poly's future profits by Professor Weil.

*Comment and Finding:* I have previously discussed my reasoning on allowing these changes in projections at length. Defendant was in no way prejudiced by the changes, and its objection here is not well taken and is overruled.

60. Allied claims that I erred in allowing Podolak to give speculative opinion testimony regarding future volume of General Poly's sales and future levels of its average selling prices. Podolak was unqualified due to the following: his involvement with General Poly ended in 1980; his testimony that General Poly could have sold 780,000 lbs. of film per month was speculative and contrary to the evidence; his testimony that General Poly had the capability to produce 780,000 lbs. of film per month was contrary to the evidence; his testimony that the average selling price of film was 99 cents per lb. was speculative and contrary to the evidence.

*Comment and Finding:* This objection is entirely redundant. I have addressed these same arguments several times. Defendant is again overruled.

61. Allied claims that I erred in admitting Podolak's hearsay testimony as to what Walker told him about the January 10, 1979 meeting.

*Comment and Finding:* I overruled this objection at page 4209 of the transcript. Such testimony was reliable give the circumstances. Defendant is also overruled here.

62. Allied claims that I erred in admitting the hearsay testimony of Podolak regarding Traver's opinion of the Peru testing.

*Comment and Finding:* I overruled the hearsay objection at page 4212 of the transcript. Such testimony showed state of mind and was reliable given the circumstances. Therefore, defendant's objection is overruled.

63. Allied claims that I erred in admitting Podolak's conclusory testimony that General Poly needed Allied's help in a "fiduciary way."

*Comment and Finding:* I overruled defendant's objection at page 4208. Defendant is again overruled here.

64. Allied claims that I erred in admitting Podolak's hearsay testimony regarding Walker and Traver's problems with blending Allied's resin.

*Comment and Finding:* I overruled the hearsay objection at page 4228 of the transcript. At that point in the case, given the testimony of others, Podolak's statement was both relevant and inherently reliable. Therefore, defendant's objection is overruled here.

65. Allied claims that I erred in admitting Weil's testimony regarding plaintiff counsel's statements to him about the merits of plaintiff's claims.

*Comment and Finding:* I overruled the hearsay objection at page 4274. The witness was an expert and, of course, entitled to understand the reason for his employment. Rule 703. Defendant's objection is overruled.

66. Allied claims that I erred in my comments to the jury about Weil's changes in his projections.

*Comment and Finding:* At pages 4288-89 of the transcript, understanding that the jury might be confused about the change in Weil's projections, I stated in part as follows:

> Plaintiff in this case claims lost profits allegedly as a consequence of a breach between the parties and as such, have a witness here to project from his standpoint those profits that were claimed to be lost. In this case within the recent past I have ruled, so far as the litigants are concerned, that the plaintiff's claim for lost profits, consistent with the terms of the written agreement, would be limited to three years from the date of first receipt of high molecular weight resin, approximately the date of July, 1981. . . .

Counsel then approached the bench and defense objected to my having implied that the plaintiff was entitled to lost future profits. I overruled the objection, stating that I had made clear to the jury that this would be an issue for them to determine. Having reread the transcript, I am convinced that my comments were timely and correct and did not prejudice defendant. Allied's objection here is overruled.

67. Allied claims that I erred in admitting Weil's projections due to lack of foundation.

*Comment and Finding:* Again, this is a completely redundant argument and defendant's objection is overruled.

68. Allied claims that I erred in admitting the additional information on plaintiff's Exhibit 2288-D concerning lost profits of plaintiff.

*Comment and Finding:* At page 4319 of the transcript, the defense objected to the addition of the information, claiming they were surprised there was a claim in the case for lost future profits. Clearly, and as I noted at the time, the claim for lost future profits had been in the case from the beginning. Defendant's objection is not well taken and is overruled.

69. Allied claims that I erred in permitting Weil to testify regarding whether General Poly could have survived if it had received 500,000 lbs. of Allied prime resin on 90-day terms.

*Comment and Finding:* I have previously addressed this very objection and it is again overruled.

70. Allied claims that I erred in admitting plaintiff's Exhibit S-190, SEC Form 10-Q, for Allied Signal Corp., because the exhibit was irrelevant as there was no basis for an award of punitive damages.

*Comment and Finding:* These exhibits were admitted at page 4330 of the transcript. As previously, and extensively, discussed, the question of punitive damages was properly submitted to the jury and this evidence was relevant to their consideration. The defendant's objection is overruled.

71. Allied claims that I erred in admitting the testimony of Robert Heitkamp that he would have continued to do business with General Poly had it continued in business. Such testimony was speculative.

*Comment and Finding:* The objection was heard and overruled by me at page 4403. The testimony was relevant to the issue of lost future profits. Allied's objection here is also overruled.

72. Allied claims that I erred in admitting the testimony of O'Connell that General Poly owned a competitive advantage over other film producers.

*Comment and Finding:* This objection is repetitive, has previously been addressed by me, and is again overruled.

73. Allied claims that I erred in admitting plaintiff's Exhibit S-199, which lists the competitive advantages testified to by Mr. O'Connell.

*Comment and Finding:* This exhibit was admitted at page 4494. I was not in error and defendant's objection is overruled.

74. Allied claims that I erred in admitting the testimony of O'Connell that General Poly would have achieved Weil's projected rates of return.

*Comment and Finding:* When this objection was made by defendant, I had counsel come to the bench. I wished to clarify that the thrust of the objection was not to challenge the paraphrasing of what Professor Weil said. Defendant said that was not its objection, but rather, that the objection was to the qualifications of the witness. On that basis, I overruled the objection. Defendant also objected to foundation. That too was overruled. The matter was within O'Connell's realm of expertise. Therefore, defendant is overruled here.

75. Allied claims that I erred in failing to strike O'Connell's testimony in its entirety.

*Comment and Finding:* Defendant's motion to strike O'Connell's testimony was made at page 4539. I heard defendant on the motion and then overruled it. Defendant is again overruled here.

76. Allied claims that I erred in allowing plaintiff to cross-examine Prince on Allied's extension of credit to its other customers. Such testimony was irrelevant, outside the scope of direct, and not Prince's responsibility.

*Comment and Finding:* At page 4823, I overruled this objection because, as plaintiff had stated, "the man testified about sales, he testified that there weren't orders, testified to the full range and he's your [Allied's] corporate representative. These documents show that you have extended credit up to 105 days to customers with whom you have no agreement simply because they have cash problems and for

other reasons. It's very relevant." (Tr., p. 4823.) Such testimony was not outside the scope, was relevant, and I did not err in admitting it. Defendant here is overruled.

77. Allied claims that I erred in admitting plaintiff's Exhibits 291, 496, S-118 and S-119.

*Comment and Finding:* These were exhibits which established the extension of credit by Allied, discussed above. Defendant's objection is overruled.

78. Allied claims that I erred in admitting plaintiff's Exhibit 1654 over defendant's objection that the document was a privileged communication from Mr. Bonin to an Allied lawyer.

*Comment and Finding:* This objection was previously addressed by me at No. 34 above. Allied is again overruled.

79. Allied claims that I erred in allowing plaintiff to cross-examine Bonin about the unpublished General Poly article.

*Comment and Finding:* I overruled this objection at page 5112. In the context of this motion, I have discussed the relevance of the document itself. Defendant's objection is therefore overruled.

80. Allied claims that I erred in disqualifying its trial counsel.

*Comment and Finding:* This matter was handled prior to trial. It was extensively briefed and argued by the parties. It was carefully and thoroughly considered by me prior to my ruling disqualifying Foulston, Siefkin from the proceedings. Allied was denied mandamus relief on this ruling by the Tenth Circuit. I now find this to be an inappropriate ground on which to base a motion for new trial. Also, I find the motion reasserted here to be somewhat incongruous. If Foulston, Siefkin had not been disqualified, it would have tried this case. In other words, Morrison, Hecker would not have tried the case. It appears defendant is somehow claiming it was prejudiced by Morrison, Hecker having tried the case. Such is nonsense!

81. Allied claims that I erred in denying defendant's request for a continuance on February 20, 1987, because of the fact that defendant's trial counsel had been disqualified.

*Comment and Finding:* By the time this case finally went to trial on March 31, 1987, "it was already five years old. Morrison, Hecker had been involved in the case throughout this time. To somehow argue that defendant was prejudiced because its 11th hour addition of new trial counsel was disqualified and its subsequent motion for a continuance was denied is incredible! The motion was viewed by me as yet another tactic to postpone the inevitable — a jury trial. The defendant was not prejudiced by my ruling. Its objection here is overruled.

82. Allied claims it was error for me to refuse to disqualify myself prior to trial.

*Comment and Finding:* Again, this is a pretrial matter which was extensively briefed and argued, and was carefully considered by me. There was absolutely no reason for me to disqualify myself, and all parties received a fair trial.

Moreover, I would note that the reason for the recusal motion was that I was acquainted with Don Wurth, one of the bond underwriters of General Poly who was called in this case as plaintiff's witness. I had at one point mentioned that I vaguely remembered Don Wurth returning from a trip to Peru having to do with some new business venture. Following Wurth's testimony at trial, I called counsel to the bench and made the following statement:

> Let me make one other record while we're having Mr. Wurth. I have listened to his testimony and it might relate to a motion that I would recuse. So far as I can tell you, other than for him to report that he was excited or impressed with what he saw there, there isn't a thing this man said that I ever recall him reporting to me in our conversations, and secondly, understanding that discovery entered into his personal records, I am satisfied that my recusal of Mr. Stout was a correct order. I just want that in the record.

(Tr., p. 3509.) And at that time Mr. Beck responded, as I recall, with a smile on his face: "Haven't even raised the question."

The defendant's motion for new trial on this ground is overruled.

83. Allied claims that I erred in sustaining plaintiff's objection to defendant's Exhibit 1248, a business record of General Poly.

*Comment and Finding:* Allied's objection gives me no reference to when this exhibit was admitted, what it related to, or which witness was on the stand when it was sought to be admitted. Nor has the defendant set forth how it was prejudiced by its being excluded from evidence. Allied's objection here is overruled.

84. Allied claims that I erred in reading the instructions to the jury prior to closing argument, in violation of Fed.R.Civ.P. 51.

*Comment and Finding:* During the instruction conference I made the following comments:

> I anticipated from the defense an objection to procedure adopted here and I wanted to say it and then you can comment: my practice is to instruct first, followed by arguments. I appreciate the rule which suggests that the trial court will follow the arguments. I have nicely coincided with that in that the last instruction is read after the argument is finished. I have never had an objection by a lawyer yet to my practice. I'm absolutely convinced the state rules which recognize the trial court will instruct first make far more sense for the benefit of the lawyers' arguments to the jury and the jury's understanding of how they play than do our federal rules. So, since I have come here, I have followed that practice. I am also persuaded that those that are studying the new rules will probably recommend it to the federal court and I'm certainly satisfied that I'm in the company of a host of colleagues in the Tenth Circuit who follow this practice anyway.

(Tr., pp. 5716-17.) Defendant did object to this procedure. It is interesting to note that Rule 51 was amended on March 2, 1987 (although the amendment did not become effective until August 1, 1987), to state: "The court, at its election, may instruct the jury before or after argument, or both."

I firmly believe the defendant was in no way prejudiced by having the instructions read prior to argument. This procedure is beneficial to the jury. Defendant's objection is overruled.

85. Allied claims that I erred in failing to select a 12-man jury when defendant refused to agree to less.

*Comment and Finding:* Local Rule 23 provides that a jury shall consist of at least six members. It was not necessary for me to obtain the consent of counsel before impaneling nine jurors, two of whom were alternates and were excused just prior to deliberation. Defendant's objection here is without merit and is overruled.

86. Allied claims that I erred in refusing to allow defense witness Mike Duerr to testify on the frequency of collaboration between customers and manufacturers on new products.

*Comment and Finding:* I did not err in refusing to allow such testimony. Allied failed to identify Duerr as an expert prior to trial. Moreover, his proposed testimony related to business in general and had no probative value on the issue of whether the General Poly/Allied collaboration was special or unique to these parties. Therefore, his testimony was irrelevant. Allied's objection is overruled.

87. Allied claims that the errors set forth in paragraphs 1-92, inclusive, are cumulative and defendant was prejudiced.

*Comment and Finding:* I have painstakingly addressed each ground for new trial raised by defendant. My rulings were not in error at the time they were made, and there was no cumulative error which prejudiced defendant. Defendant is overruled here.

88. Allied claims that the size of the jury verdict was excessive and against the weight of the evidence.

*Comment and Finding:* This matter has been extensively addressed by me in the context of the motion for judgment notwithstanding the verdict. Defendant is overruled.

89 and 90. Allied claims that the plaintiff's closing argument was improper, inflammatory, and prejudicial to defendant.

*Comment and Finding:* Plaintiff counsel's closing argument addressed matters raised by the evidence. It was within the latitude of advocacy extended to the parties by me. Allied's counsel was permitted to make the same kind of vigorous argument, and did. The jury was instructed that arguments of counsel were not evidence. Allied was not prejudiced by plaintiff's closing argument, and its motion here is overruled.

91 and 92. Allied claims that I erred in admitting testimony over defendant's objection; and that I improperly excluded admissible evidence.

*Comment and Finding:* These wholly redundant arguments bring me to the objection raised at No. 35 above, i.e., the verdict is against the weight of the evidence.

Here, I fully intend to take some liberties with the defendant's issue, and by way of response attempt to clarify why it was that Allied lost this case. I am convinced that the plaintiff prevailed here, and of course defendant lost here, for several reasons. I will state categorically that it has nothing to do with my rulings or the manner in which I conducted the trial of the case. I best expressed this view, in a manner which probably suffices any rulings heretofore made, at a time when defense counsel moved again for a motion for mistrial, as reported at page 3555 of the transcript. Here, counsel appeared again in chambers, this time to share their "dark and unhappy thoughts" and proceeded to restate their concerns. While only capsuled here, these included the fairness of trial, my coaching of the plaintiff counsel — particularly after having created plaintiff's cause of action regarding breach of fiduciary relationship, their surprise for this as such an issue isn't within the pretrial order, their dismay — indeed shock — with certain of my trial rulings, their questioning of my motives in allowing my sympathy for plaintiff to affect my judgment. To all of this I responded as clearly as I was able, and in so many ways it "says it all" and bears repeating in full here:

> THE COURT: Let me simply —
>
> MR. CROWLEY: Referring to the summary judgment motion?

THE COURT: Yes. Make these comments to you that I suppose I could start by saying I'm surprised that the defendant is surprised and professes some form of dismay with regard to the change of direction and perhaps undertaking of the theory of breach of a fiduciary relation, which under the state of the present evidence in my view exists and one which will be put to the jury if I have any reasonable grasp of its term. In substance, fiduciary or a confidential relation probably exists where there's some special confidence reposed in one who, in good conscience, is bound to act in good faith with due regard for the interests of one reposing such confidence. I think it exists between persons in regard to a business or a contract or in regard to the general business of the parties and can exist as it relates to how one might exercise the terms of a contract.

Now, that's the very general broad definition. In my view this kind of claim has lain dormant, if you will, through the course of much of the plaintiff's case. That's not to say that it has not been claimed, and the claim is spelled out in the pretrial order. If you haven't read the order, perhaps you should. The claim was addressed as well at the time of hearing on summary judgment and I addressed it then, and we researched it then, drawing upon the *Denison State Bank* case by its terms and application. I can recall in-house discussions as to how it might lie here uncertain as to how it might lie here, but giving some credence to the plaintiff's claim at that point, believed that it was there to be established if the plaintiff could make its case, and as you might recall, I overruled that part of the motion for summary judgment and said if this established, it would be for the jury to ascertain if this relationship between the parties was a fiduciary one.

Now having said that, when I prepared for this trial, so that I could articulate to this jury a something about what is this case and what are the claims and be reasonably conversant and comfortable, I started with a conference here with lawyers having had an outline of the case and sought your input of how do you discuss or explain high molecular weight high-density polyethylene as opposed to high-density. I remember what is an

extruder. I capsuled for both of you what I thought I would say to this jury, as my notes show, as I recited plaintiff's claim, aside from breach of contract and claims of oral contracts made earlier which plaintiff says are a part of the whole, and claims for misrepresentation, I said to that jury: "And a claim for breach of fiduciary relation."

Now, having said that, it was clear to me that plaintiffs elected to proceed on what they thought was the thrust of their case. I did not hear in opening statement any mention of breach of fiduciary relationship. It was clearly a case of first having established some form of an oral agreement which in turn is claimed to be part and parcel with the written agreement of September and which would explain it in sorts. The breach of the written agreement then as composed of the terms and/or the oral agreement, coupled with a claim of misrepresentation following the Peru incident, that was the substance of the plaintiff's claim as I saw it. Every ruling I made was conditioned upon the state of the evidence as I see it.

I think we started in a rocky setting between myself and plaintiffs as they persisted with an unique technique of trial, engaging the discovery depositions of principal defendants ostensibly as admissions. We had a hearing and I entered my rulings and I believe they were the correct ones. If there were admissions within the confines of the depositions, so be it. But as I saw it, plaintiff was on track here with calling literally key defendant witnesses, one person putting all of the questions to the witness. I think I said to plaintiff at one time: "This process is not only an awkward one but I think it is risky. You get the good news with the bad news," and that which remains uncontroverted, seems to me, is part of your case as you ask this jury to hear that witness. That was part of the plaintiff's case, and in the course of that I'm sure gave rise to several conferences in the back room where I said more than once: "I think you have some problems here."

In the entire context of plaintiff's case as it arose, when objections were raised, as I said more than once, I rule when they are raised and I rule consistent with the state of the evidence at that point. I did. In my view it is incumbent upon the plaintiff to establish a meeting of minds between its principals and Allied as to the oral agreements. It may well be some of those terms are indeed embodied in the agreement. I don't think anyone here argues but that everyone was targetting [sic] upon a product as good as Hoechst. What was not agreed was date of delivery or price as plaintiff argues.

As to the contract itself, when the question came, I think first with Mr. Walker, to the effect: "And did this breach contribute to your collapse," or words to that effect, I ruled that the contract has not been shown to be breached, or words to that effect.

As to the event in Peru, drawing upon what I heard of plaintiff's witnesses such as Mr. Sells [sic], who put in place the need to order up Solvey [sic] and use it as they learn to develop their own, drawing from my own experience in other cases, none of that struck me as fraudulent as defined by the *Nordstrom* decision, and I had a problem as to whether in any setting there was a duty to communicate the real scenario to the General Poly principals, and I said so. At best I thought we had a negligent misrepresentation in the works. If someone took that representation and made a decision to invest one, so be it. If, on the other, it was a consideration to contract, so be it. In either event, it's clear to me that by May of 1979, the principals were aware of the fact that Allied would not have the kind of resin they saw at Peru on stream for development when they opened up. And I think I said in that setting the statute probably had run as well.

Now those were findings I made, Mr. Crowley, at the state of the evidence and because I'm absolutely convinced in that setting the Uniform Commercial Code applies and it made no difference to me as I looked at a host of invoices ordered up, accepted, that Section 2-606 through 608 had probably been complied with. I took no pleasure to such rulings. I think at about

the time Mr. Traver was on, the similar question was put to him and a similar decision was handed down, thrust of which was to say: "At that state of the evidence on a claim for breach of contract, it's irrelevant." I took no pleasure in that, but I did what I had to do, and to suggest to me that somehow I have prejudiced Allied and made such a decision is facetious. I did what as a trial judge I thought I must, whether I liked it or not. The problem I have and the problem I had then.

MR. CROWLEY: May I comment, Your Honor?

THE COURT: No, I'm going to finish. I was uneasy with it, uneasy because in my own heart it wasn't fair. I recollect as I would it [was] because from my own experience engagement of UCC rules ofttimes [sic] is not fair or equitable. For what it's worth, I have had a very similar experience in the use of section 2-608 where one has received a product knowing full well what it has and reconciling it rather than to remonstrate or to take issue. In my view they bought the farm under UCC. I have seen other inequities in those instances as we deal buyer/seller; that's what UCC implies as it relates to a contract in that setting. The most inequities I have ever dealt with are those when a buyer signs-off [sic] for receipt of his product, finds that it is not workable, perhaps defective in some way, then remonstrates, only to learn that having signed off, the back page has disclaimed warranties other than for labor and parts perhaps. I don't know how many times I have had to look down, whether it's oilfield equipment, wells lost or computer bought and shops shut down, to say: "I'm sorry but under UCC, you bought the farm." And so I felt that way here, and I reconciled my decision. As hard and as unfair as my decision may have appeared, I was satisfied as a trial Judge I did what I had to do. That's not to say I liked it or was pleased with it or comfortable with it, with these plaintiffs. So don't tell me somehow I have bent over to help the plaintiff.

What I have to say to you is that I was not a prophet in the sense of saying that they're [sic] still lies this fiduciary claim. It's the kind of thing, if you will, that was there right in front of my nose

and the plaintiff's but so close to me I couldn't see it. That is what happened here. I entered a ruling with Mr. Traver, thrust of which laid him on the ground almost out, if not out, and to my surprise the defense persisted for a day and half in cross-examination. If anyone was aghast, it was me to listen. It was either you didn't hear me or you distrusted my judgment. But as sure as God made green apples, the defense brought the fiduciary claim to the surface as I listened to Mr. Traver cry out literally in attempting to explain his confidence and trust imposed on Allied and what he had agreed to do and they had agreed to do, and they breached it and they wouldn't help him. They wouldn't turn a tap, and they shut him off, and the lights went on. I looked down at plaintiff's counsel and the plaintiff's bench was aglow. They caught the same point I was searching for and why I was so unhappy and displeased with my ruling, and there it was. This claim is a claim, in my view, for the breach of a fiduciary relationship that exists between these incorporators, or General Poly, and Allied through the likes of Mr. Bonin and Mr. Sells [sic] as they put in place this agreement. And that question will go to the jury. This jury will hear the definition of a fiduciary and they will be asked if they agree with that, to proceed. If they do not, they will find for the defendant. It's that simple. That is the way I see this case at this time.

Your motion for mistrial is overruled. Now, ready to go?

MR. CROWLEY: May I respond, briefly respond?

THE COURT: You may.

MR. CROWLEY: I suspect from the tone of the remarks of Your Honor that the intent of our motion has been misunderstood.

THE COURT: It was for a mistrial and you claim that I'm prejudiced and that I have somehow bent over backwards to create a new theory for these people, which is not so. So, I let you understand my reasoning, that's all.

MR. CROWLEY: We stand by our statements in that regard.

We did not mean to imply that the Court was guilty of some bad faith or that it was intending to take a partisan stance in this lawsuit. We do think the practical effect of the Court's ruling has worked to the considerable prejudice of Allied and great benefit of the plaintiff.

On the particulars about the new causes of action —

THE COURT: Not a new cause of action, Mr. Crowley. I will correct you there. It was in the pretrial order, you addressed it in summary judgment motion, I ruled on it; I advised this jury this claim may well go on fiduciary breach, and why you say this is a new claim completely mystifies me.

MR. CROWLEY: I say it, Your Honor, because we are well aware that the words "fiduciary relationship" — word "fiduciary." In any event, certainly appears in the pleadings and certainly appears in the pretrial order. What is new and novel is the suggestion that that relationship somehow evolved from or is somehow connected with General Poly's use of off-grade resin, and that is a theory which has never been pleaded or argued and simply been handed to the plaintiff in this suit. We think when this ruling was made, we do not suppose that plaintiff is now going to admit the point. We think that they were as bewildered we were.

THE COURT: Direct evidence that your sales representative said to Mr. Traver: "Please take their off-grade. Help us. Again, let us get rid of it so we can move on with prime." That is in evidence.

MR. CROWLEY: We certainly heard that testimony.

THE COURT: You tell the jury there is no evidence that you acquiesced in that agreement. What do you call that, other than it is very consistent with the claim of mutual confidence and trust as they work together toward reaching some common goal, i.e., development of high molecular weight resin and get it on stream as readily as they can together.

MR. CROWLEY: We call that a garden variety sales contract. There was an appeal made to sell something in exchange and Mr. Traver made no effort to conceal the motive on his part. Exchange for a concession in price. It was to the mutual advantage of both parties.

THE COURT: I think it was also a crying out for some help consistent with the trust imposed by both sides on the other as they attempted to develop this product and get it timely on the market. And by definition, the jury will understand its terms and you can argue that to the jury. You can tell them it was a hard and fast, hard-cut contract; "we did our part and they did theirs and they breached it." If the jury agrees it's not a fiduciary relationship, they will find for the defendant in the first question. It's that simple.

MR. CROWLEY: I guess we are at a loss to understand how this differs from any other routine transaction, and are suddenly all sales transactions suddenly to be infused with some kind of fiduciary duty so that people can no longer depend on the terms of the bargain they arrive at, but are going to have to answer to a Court for the arrangement they should have made?

THE COURT: I guess I have to say to you if you understand its terms, as I think I do, and you track this development, people such as Mr. Walker and Mr. Traver on stream with a good idea and having the expertise and the extruder, simultaneous with a company like Allied that sees this market and not ready to proceed at that time but see an opportunity to work together with somebody like Mr. Traver and whose communications started with the folks as early as October of '78 and through January of '79, and at Peru relying upon what they understood to be mutually beneficial and evolving into a contract whose very terms would impart mutuality, yes, I think this jury could very well say that is a fiduciary agreement or relationship, and as a consequence dictates the terms of the contract, and how they would carry it out as between the parties. Now that is Judge Kelly speaking. I think I'm right on that. Plaintiff's [sic] may disagree but I don't think so.

> Any way [sic], I appreciate you're raising the motion and you're overruled. We will proceed.

(Tr., pp. 3564-74.)

There are other reasons why the plaintiff won and defendant lost. They are because of the quality of the plaintiff's claim, the substance and believability of plaintiff's witnesses and their evidence! To make the point, one can best compare the testimony of the respective principals as they vie for the jurors' acceptance. Consider first, by example, the testimony of Mr. Traver, president of General Poly. Hans Traver was clearly the guiding force as pertains to plaintiff's venture. He is an extremely intelligent, experienced and most decent sort. He enjoys an international reputation in this business. He most ably reviewed the respective histories of these companies and explained to the jury why it was important for both to exercise their respective roles with a sense of mutual trust. It was clear to this jury that the plaintiff had carried out its part to the fullest, and it was also clear that he had every reason to assume that representatives of Allied were also under way with their part of this deal.

Mr. Traver's testimony was fully corroborated by that of Bud Walker. This gentleman is an aggressive and successful entrepreneur. He is most articulate and persuasive. Given past experience with Allied, he had good reason to trust here, and he did. He also had good reason to believe that Allied's representatives trusted him and were putting in place the very rudiments of a fiduciary relationship.

Finally, consider the testimony of Ed Podolak, an articulate, well-educated businessman. Defendant undoubtedly viewed this witness with some surprise as he is more than a former professional football player. Podolak also has a degree in business, has been a banker, and clearly did his homework in the plastics business as he put in place the basis for a successful venture in General Poly. There has been some criticism raised here as to whether he was qualified to testify as an expert. In my view, Mr. Podolak was a most persuasive witness, was indeed qualified, and his well-founded presentation turned the tide for plaintiff's case.

There is much more to plaintiff's case than capsuled here. But compare it if you will with what is addressed in the defendant's response. Would the defendant seriously compare the testimony of its president, Mr. Belzer. Mr. Belzer did not and could not defend his company here, nor was he called to testify, nor was he ever present in the courtroom. This was simply because he had no personal recall of the relevant facts and circumstances surrounding execution of the very agreement he signed. As stated previously, his apparent indifference did not go unnoticed by the jury.

As an aside, it seems to me it would be in the interest of the key leadership of Allied to see to it that henceforth Allied's good name will be preserved, and that the word of the company will be honored. I am certain that when the chief executive officer of Allied learns of this case, he will be as dismayed as this jury and will henceforth see to it that the president of the company understands the contents of a contract before he signs it on behalf of Allied. Indeed, if it takes the assessment of sizeable punitive damages to impart this view, so be it! This was the jury's view, and as indicated previously, I fully concur.

Finally, compare the testimony of witnesses Prince and Bonin with plaintiff's principals. Mr. Prince was not all that conversant with the real issues at hand. In my view he was offered as an "apologist" for Allied. He was permitted to review the company's practices and policies and, of course, denied the content of the plaintiff's case. Given full cross-examination, however, he offered little to refute the plaintiff's case.

Mr. Bonin was called to state the rudiments of the defense, and he was fully permitted to do so. His loyalties to defendant were not in question. He had risen through the ranks to his present position. He did, of course, deny plaintiff's claims. However, upon extensive cross-examination, Mr. Bonin left the stand, in my view, tempered and compromised. When he stepped down, the issues were squarely on the table and for the jury.

Or consider that Mr. Snell, the very person in charge of HDPE resin development, was *not* called. This was despite the fact that plaintiff

had presented his testimony through discovery deposition and it put in place the rudiments of a fiduciary relationship and constructive fraud. This testimony revealed that he, along with Bonin, had seized upon the plaintiff's proposition for a joint development effort and had encouraged the rebagging of Solvay resin in time for the Peru test. I am convinced that Mr. Snell's silence was not missed by this jury.

Or consider defendant's failure to call Mr. Heath. Recall that it was Mr. Traver's testimony regarding his conversations with Mr. Heath which brought the fiduciary relationship to light. Consequently, Mr. Heath's testimony became all important to the defense. I'm certain the jury awaited his testimony and explanation, yet Mr. Heath was *not* called. For these reasons alone, it is hardly any wonder that this jury found for the plaintiff.

Further, and in response to the matter before me, given the evidence and testimony presented in this case, the jury's verdict was clearly *not* against the weight of the evidence.

In my view, there is also another reason why the defendant lost this case, and it is deserving of comment. Simply said, the plaintiff's case was won due to the quality and perseverance of counsel. I have said more than once during the course of this case that I have officiated over a great trial engaging fine lawyers from both sides. It was truly a contest. In my view, plaintiff's counsel are among the best ever to grace my courtroom. These gentlemen came prepared to try a case others would probably have disclaimed. There is no question in my mind but that the defendant was bent on the proposition that it would simply wear out or beat down the plaintiff's efforts. In my view, a review of the massive docket sheets reflects a classic example of discovery abuse, and it is no mystery why Chief Judge O'Connor, who assigned this case to me, has previously identified the defendant as the most dilatory litigant with whom he had ever dealt!

Plaintiff counsel traveled to Wichita and presented themselves here fully organized and ready for trial. They truly came to win. Mr. Edgar reminded the jury in final argument that plaintiff's plight was much akin to that of "little" David as he took on the "mighty" Goliath. And

so it was — and we know the result! Counsel knew their clients and believed in them; they stayed with their clients through thick or thin. In a most persuasive and well-organized manner, they articulated the testimony of their clients and witnesses, knew the contents of their exhibits, and they fully addressed defendant's witnesses and exhibits. They brought to this jury all the jury needed to hear as pertains to their cause.

And when adversity struck, and it surely did, these counsel did not buckle, nor did any of them strike out against me. No one attacked, directly or indirectly, my integrity or intelligence. These lawyers simply made their record and moved on. As the record reflects, at one point in time, given my rulings, plaintiff's case was simply moving into oblivion! Being good lawyers, they did not panic; they waited and listened, hoping against hope for some break — any break — which just had to come. It came in the course of Mr. Traver's cross-examination. In my view, they then demonstrated good lawyering at its best! They promptly seized upon this entree, and from that moment on they proceeded with a sense of zest and confidence.

Lastly, it was the jury — and not this court — which had the final say in the case. No one throughout the entire course of trial ever questioned this attentive and patient jury's prejudice or partiality. The jury, notes and exhibits in hand, took at least two weeks for deliberation, and in the course thereof I am convinced it reviewed and digested all of the material evidence and reached a fair and impartial decision.

In the final analysis, these litigants — both sides — have had their day. They have received the fullest and fairest trial I am personally able to provide. Moreover, the verdict was the result of a panel of patient and intelligent jurors who demonstrated that our system works. I am aware of no reason why the jury's verdict should be disturbed, nor will it.

IT IS ACCORDINGLY ORDERED this 26th day of February, 1988, that defendant's motions for judgment notwithstanding the verdict or for new trial are overruled.

/s/ PATRICK F. KELLY, JUDGE

## APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

CASE NUMBER: 82-2282

ERIC C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation,

v.

ALLIED CORPORATION

**JUDGMENT IN A CIVIL CASE**

(Filed: July 2, 1987)

XX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has received its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff Eric C. Rajala, Trustee in Bankruptcy for General Poly Corporation, recover of the defendant Allied Corporation the sum of $10,335,810.10 in actual damages, and $60,000,000.00 in punitive damages, with interest thereon at the rate as provided by law.

APPROVED:

/s/ PATRICK F. KELLY
U. S. DISTRICT JUDGE

Date: July 2, 1987

RALPH L. DeLOACH
Clerk

/s/ Ruth Thompson
(By) Deputy Clerk

## APPENDIX H

UNITED STATES DISTRICT COURT
D. KANSAS.

No. 82-2282-K.

Eric C. RAJALA,
Trustee in Bankruptcy for General Poly Corporation,
Plaintiff,

v

ALLIED CORPORATION,
Defendant.

Oct. 30, 1986.

Trustee for Chapter 11 debtor brought adversary proceeding against creditor for its alleged breach of contract, breach of fiduciary duty, conversion and fraud. The District Court, Patrick F. Kelly, J., held that: (1) under New York law, mixed development-sales agreement between debtor and creditor was subject to Article 2 of Uniform Commercial Code; (2) development-sales agreement was "facially incomplete," so that parol evidence was admissible to supplement its terms; (3) material question of fact as to whether debtor's failure to timely pay for resin it received from seller excuse seller from thereafter offering resin to buyer in accordance with "first right to purchase" clause in agreement precluded entry of summary judgment for buyer on breach of contract claim; and (4) material question of fact as to when debtor reasonably should have discovered creditor's alleged fraud precluded entry of summary judgment for creditor on fraud claim.

Creditor's motion for summary judgment denied.

**1. Sales key 9**

Under New York law, mixed development-sales contract was subject to Article 2 of the Uniform Commercial Code, where development portion of contract was only incidental to dominant goal of sale and purchase of developed product. U.C.C. § 2-201 et seq.

**2. Frauds, Statute of key 85**

Under New York law, contract for sale of goods in excess of $500 was subject to a special statute of frauds found in Uniform Commercial Code, and not to general statute of frauds, though contract allegedly could not be performed in one year or less. U.C.C. § 2-201; N.Y.McKinney's General Obligations Law § 5-701.

**3. Federal Civil Procedure key 2011**

Question of whether written contract is fully integrated, thereby precluding introduction of any parol evidence, is question of fact to be determined by trial judge outside of presence of jury.

**4. Evidence key 417(12)**

Under New York law, contract between parties for sale of high density polyethylene resins was "facially incomplete," so that parol evidence was admissible to supplement its terms, where contract did not contain merger or integration clause and failed to set forth price, credit terms, quality of goods or date of delivery. U.C.C. § 2-202.

See publication Words and Phrases for other judicial constructions and definitions.

**5. Sales key 1(1)**

Under New York law, gap filler statutes could not be used to complete incomplete sales agreement, where parol evidence was admissible to establish missing terms. U.C.C §§ 2-202, 2-326, 2-327.

**6. Federal Civil Procedure key 2510**

Material question of fact as to whether alleged oral sales agreement was in fact inconsistent with written contract prevented bankruptcy court from deciding, at summary judgment stage, whether evidence of oral agreement was admissible under New York parol evidence rule. Fed. Rules Civ. Proc. Rule 56(a, c), 28 U.S.C.A.; U.C.C. § 2-202.

**7. Federal Civil Procedure key 2510**

Material question of fact as to whether buyer's failure to timely pay for resins it received excused seller from thereafter offering resins to buyer in accordance with "first right to purchase" clause precluded entry of summary judgment for buyer on breach of contract claim. Fed. Rules Civ. Proc. Rule 56(a, c), 28 U.S.C.A.

**8. Federal Civil Procedure key 2510**

Material question of fact as to whether parol evidence was admissible to prove oral and development-sales agreement, pursuant to which manufacturer was given "royalty-free" access to buyers' extrusion technology, preclude entry of summary judgment for buyer upon unjust enrichment and quantum meruit claims. Fed. Rules Civ. Proc. Rule 56(a, c), 28 U.S.C.A.

**9. Joint Adventures key 1.12**

Under Kansas law, development-sales agreement did not give rise to any "joint venture" between parties, though manufacturer agreed to develop and supply to buyer a high density polyethylene resin, and though the buyer agreed to provide manufacturer with royalty-free access to its technology to assist in development of resin, where manufacturer and buyer did not carry out single business enterprise for profit.

See publication Words and Phrases for other judicial constructions and definitions.

**10. Federal Civil Procedure key 2510**

Material question of fact as to whether development-sales agreement gave rise to any fiduciary duties between parties precluded entry of summary judgment for seller on buyer's fiduciary claim, where buyer allegedly relied on seller's assertion that it was close to developing high density polyethylene resins in entering into business dependent upon that technology. Fed. Rules Civ. Proc. Rule 56(a, c), 28 U.S.C.A.

**11. Federal Civil Procedure key 2515**

Material question of fact as to seller's intent in falsely assuring buyer that it would replace poor quality resin with other resin of higher quality precluded entry of summary judgment for buyer on fraud and conversion claims arising out of seller's reclamation of resin and failure to supply replacement resin of any kind. Fed. Rules Civ. Proc. Rule 56(a, c), 28 U.S.C.A.

**12. Federal Civil Procedure key 2515**

Material question of fact as to when buyer should have reasonably discovered that resin it had received for testing was in fact manufactured by company other than seller precluded entry of summary judgment for seller on buyer's fraudulent misrepresentation claim, where seller had repeatedly assured buyer that it had nearly perfected resin and would soon be able to supply commercial quantities of resin to buyer. Fed. Rules Civ. Proc. Rule 56(a, c), 28 U.S.C.A.

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Ronald L. Holt, Stinson, Mag & Fizzell, Kansas City, Mo., for plaintiff.

W. Dennis Cross, Morrison, Hecker, Curtis, Kuder & Parrish, Kansas City, Mo., for defendant.

**MEMORANDUM AND ORDER**

**PATRICK F. KELLY**, District Judge.

This case is before the court on defendant's motion for summary judgment. This action is brought by the trustee in bankruptcy, Eric C. Rajala, for General Poly Corporation, against Allied Corporation for breach of contract, breach of fiduciary duty, conversion, and fraud. For the reasons set forth herein, defendant's motion for summary judgment will be denied, except as to Count XIII, alleging an overall scheme to defraud.

The facts in this lawsuit are largely disputed. In 1978, Clayton A. Walker and Hans H. Traver developed plans to form the company

which later became General Poly. Their plan was to form a company which would engage in the business of converting high density polyethylene (HDPE) into film and film products such as plastic milk bottles, large drums, pails, housewares, and storage containers. Conversion of "film grade" HDPE into film and film products is accomplished by a method known as "extrusion." Special extrusion equipment is needed for this process. Some HDPE has a higher molecular weight than other HDPE and is referred to as high molecular weight high density polyethylene (HMWHD). Film products made from prime HMWHD film grade resins have significant strength advantages over products made from ordinary HDPE or from traditional low density polyethylene resins. Also, due to its strength advantages, thinner film can be produced from HMWHD resins, offering a producer of bags and film the potential for more profit.

At the time that Walker and Traver began making plans for General Poly, Walker was the principal shareholder of Vinylplex, a company engaged in the manufacture and sale of plastic pipe. Mr. Traver was the principal shareholder of PeruPlast, a company in Lima, Peru, engaged in the manufacture and sale of various plastic products, including HMWHD film and bags.

In and prior to 1987, HMWHD film grade resin was widely used in Japan, western European countries, and South America for the production of film and bags, but such HMWHD products had not penetrated the market in the United States as there were no companies in the United States which were producing and selling commercial quantities of prime HMWHD film grade resin. At that time, a German chemical company known as Hoechst, A.G. was producing an HMWHD film grade resin which was regarded as the industry standard. During 1978 through 1980, Hoechst, A.G. imported only limited quantities of its 9255F HMWHD film grade resin into the United States. This resin was being sold in the United States at a premium price due in part to higher costs of the raw materials for the resin in Europe and the absence of any other prime HMWHD film grade resin in commercial quantities in the United States. Therefore, for General Poly to buy resin exclusively from European suppliers would have been too costly, so

General Poly sought to find a domestic company which could develop a produce a resin equal in quality to that produced in Europe.

In 1978, Allied Corporation began studying the possibility of producing film grade HMWHD resin in the United States. Allied is a New York corporation which is, and at all relevant times was, a manufacturer and supplier of HDPE resin. In order for Allied to successfully develop the HMWHD resin, it needed access to state of the art, specialized extrusion equipment and experienced extrusion operators. In 1978, Allied did not have this specialized equipment, which was extremely costly, nor did it have any right of access to any such equipment in any location in the United States.

In October of 1978, a representative of Allied met with General Poly's promoters. Allied informed the promoters it was engaged in a film development program and was pursuing development and commercial production of an HMWHD film grade resin. General Poly's promoters advised Allied of their tentative plans to establish a film and bag plant in the Kansas City, Missouri area, which would be dedicated to the production of HMWHD film and bags, and they stated they were seeking a domestic supply of resin. At that time it was arranged that the General Poly promoters would later meet with Allied's Pat Snell, who headed the HMWHD film development program, regarding the status of that program and Allied's progress in development of an HMWHD film grade resin. A few days later, Allied tentaively indicated to Traver that Allied could furnish Traver with a "developmental resin" for Traver to evaluate at his PeruPlast Plant. An Allied interoffice memorandum reporting on this meeting stated it would be a "great benefit" for Allied to be "in on the ground floor" with the planned General Poly operation, and that the "only concern at the moment [was] whether or not . . . [Allied] could put together a suitable sample for the Lima, Peru operation to get this thing started." When Allied's Pat Snell received a copy of this memorandum, he added a handwritten note stating that the developmental resin which Allied could send to Traver's PeruPlast Plant was a commercial HMWHD film grade resin produced and sold in Europe by a Belgian company named Solvay et Cie.

On January 10, 1979, Walker and Traver met with several of Allied's representatives. According to plaintiff, Walker and Traver told the Allied representatives that they needed to have a domestic supply of HMWHD film grade resin equivalent to or better than the industry leader, Hoechst 9255F, and that they would not form the proposed film and bag company without obtaining such a source. They also indicated the proposed company would need to have financial assistance from Allied. Walker requested that Allied either purchase some of the bonds or guarantee the bond issue. Traver indicated that General Poly would provide technical assistance to Allied by evaluating Allied's experimental HMWHD film grade resins at the PeruPlast Plant, which had the needed specialized extrusion equipment and experienced operators. Traver and Walker indicated their proposed plant could be in operation toward the end of 1979. According to plaintiff, Allied's representatives stated that Allied was already at work on an HMWHD film grade resin development program, that Allied possessed the necessary catalyst, and that it only needed to tinker with the catalyst in order to perfect the resin. Allied stated it needed access to the specialized extrusion line design for HMWHD film, which Allied did not have. Allied further stated that with the availability of the PeruPlast Plant, Allied's timing for completion of the development program would coincide with the promoters' timing for the commencement of manufacturing operations toward the end of 1979, and that Allied could then have a prime HMWHD film grade resin available in commercial quantities for the proposed General Poly Plant. As to offering financial assistance, Allied stated that rather than backing the bond issue it could provide financial assistance to the proposed General Poly operation in the form of extended credit terms.

The parties concluded their meeting by agreeing to commence a joint development program, under which General Poly would provide extrusion technology and assistance to Allied in the evaluation and perfection of its planned HMWHD film grade resin, and Allied, in exchange, would agree to supply General Poly with prime HMWHD film grade resin of a quality and performance equal to or better than the then industry standard—Hoechst 9255F—at the time General Poly commenced manufacturing operations toward the end of 1979, with

such resin being provided at a favorable price below the prevailing Hoechst price and on extended trade credit terms.

Plaintiff alleges that in a later phone conversation between Walker and an Allied representative, Allied agreed to provide 90-day credit terms, and perhaps more. According to Walker, Allied also stated that the HMWHD film grade resin would be priced to General Poly at a price within one to two cents of prevailing prices of Allied's existing injection molding grade resins.

On January 23, 1979, Allied wrote a letter to Walker confirming the parties' joint cooperation agreement. The letter stated Allied wanted General Poly's promoters to evaluate Allied's new resins as they were developed at the PeruPlast Plant in Lima, Peru, and further, that Allied would be forwarding to Walker "a secrecy agreement required to ensure the confidentiality of our joint effort."

A draft of the proposed secrecy agreement between the parties was prepared by Allied's law department and forwarded to Walker on February 14, 1979. Plaintiff claims this agreement was intended only as a partial memorialization of the parties' January agreement. When Walker received the written document, he made a few changes, including the addition of a provision stating that General Poly would have the first right to purchase any new HDPE film grade resin produced by Allied on a semi-commercial or commercial scale, up to 80% of General Poly's monthly requirements, for a period of three years following the commercial or semi-commercial production of the resin by Allied. According to plaintiff, Walker added the right of purchase provision so there would be some reference in the written secrecy and joint cooperation agreement to the parties' January oral agreement that Allied would supply General Poly with an HMWHD film grade resin at the time General Poly began operations at the end of 1979 and thereafter. Plaintiff alleges this reference was needed to provide assurance to the underwriters handling General Poly's bond issue that Allied had committed to supply General Poly with resin. In August of 1979, a second draft, which included a first right to purchase provision, was prepared by Allied and sent to Walker. On August 28, 1979, Traver signed the agreement on behalf of General Poly. He made one last slight revision and confirmed in his letter to Allied that

with that change the agreement would "reflect totally the intent of Allied and General Poly." Allied agreed to the final change and signed the agreement on September 21, 1979.

As finally signed, the September 21 agreement between Allied and General Poly included three principal provisions: (1) the parties would cooperate to develop HDPE resins and films for a period of one year, during which Allied would have the royalty-free right to use extrusion technology developed by General Poly; (2) each party would maintain in confidence for a period of five years information disclosed in writing by the other; and (3) General Poly would have, upon 30 days written notice, a first right to purchase 50,000 lbs. per month of any new HDPE film grade resin developed by Allied for a period commencing with Allied's production of resin on a commercial or semi-commercial scale and for three years thereafter.

During the period the secrecy and joint cooperation agreement was being negotiated, the parties began to act pursuant to their agreement. On March 26 and 27, 1979, Allied's Pat Snell visited Traver's PeruPlast Plant and attended and participated in tests of what was purported by Allied to be Allied's "developmental resin Paxon 7-392" (Paxon is Allied's trade name). In actuality, the resin tested by Allied was rebagged Solvay Eltex B5920F resin, which was produced by a European company. Traver's employees at the Peru plant, who observed the test of the resin, reported to Traver that the resin, while not yet as good as the German resin, produced quite strong film and was very promising. Allied never informed anyone of the true source of its resin. Following these tests, Traver related the results to Walker, and he, in turn, advised bond underwriters that the tests of Allied's experimental resin showed Allied was not far from the industry standard, and the General Poly promoters felt confident Allied could reach the goal by the time General Poly commenced operations in late 1979. Walker also assured the underwriters that in any event the Allied experimental resin tested in Peru was already good enough quality for General Poly to utilize it in the United States market. With these assurances, the underwriters proceeded to consummate the bond issue and sell the bonds.

In June of 1979, Traver visited Allied representatives and was advised Allied would soon have a new formulation of HMWHD film grade resin for testing. Later that month Traver wrote to Allied advising that General Poly expected to commence manufacturing operations in October of that year and wished to make arrangements for its first shipment of Allied's HMWHD film grade resins. In August of 1979, Allied representatives visited General Poly's new plant and advised Traver that Allied expected to soon be able to ship its first railcar of HMWHD film grade resin to General Poly.

A second test of Allied's developmental resin was conducted at laboratory facilities in Massachusetts on August 23, 1979. General Poly representatives were present. Although the experimental resin proved to be a failure, Allied assured the General Poly representatives that it would correct the deficiencies in the resin and would soon have an improved batch of resin for General Poly to test.

In short, after Allied's successful tests of its "experimental resin" in Peru, subsequent tests conducted at the General Poly Plant of its experimental resin were continually unsuccessful. When General Poly was ready to begin production in October, 1979, it was forced to purchase the expensive German resin (Hoechst 9255F). Throughout this time Allied continued to represent that a satisfactory resin was "just around the corner." However, General Poly was not able to purchase any resin from Allied until July of 1980, when it purchased an "off grade railcar full" which resulted from Allied's mixing of various test batches of resin resulting in a "rainbow mixture" which was not reproducible. General Poly had to mix this resin with the higher quality German resin in order to obtain a satisfactory film.

Plaintiff alleges that in July of 1980 Allied had produced a new resin which it believed was suitable for General Poly's purposes. However, according to plaintiff, General Poly was not informed of this new resin or given a chance to test it until September of 1980, although Allied had previously offered it to other customers. At the time of the September evaluation, Traver was pleased with the improvement in the performance of the resin sample and was of the impression Allied was close to the point of being able to produce an HMWHD film grade resin closely

approximating the quality of Hoechst 9255F. Traver gave Allied written notice of his intention to order many railcars of this resin for the months of November and December, 1980, and the beginning months of 1981.

According to plaintiff, the first three railcars of resin which had been sampled at the film trial in September of 1980 proved to be resin of fairly good quality requiring some, but not substantial, blending with Hoechst 9255F. However, subsequent railcars of Allied resin received by General Poly in late 1980, and thereafter, became increasingly worse in quality, particularly in the area of strength and resistance to splitting, and they required substantial blending with Hoechst 9255F resin in order to produce a salable product.

Throughout late 1980 and into 1981, Allied continued to supply General Poly with poor quality resin that had to be combined with the Hoechst resin at all times. All sales were made on 90-day credit terms. Because the mixing process slowed General Poly's ability to produce film considerably, General Poly fell behind on some of its payments. During this time, a total of 13 railcars of resin were delivered to General Poly.

In May of 1981, General Poly tested a new Allied resin which appeared to be the equivalent to the German resin. General Poly was very enthusiastic and desired to exchange two railcars of unused poor quality resin for the new resin, and then apply the credit for the old railcars against General Poly's oldest outstanding debt with Allied. According to plaintiff, Allied agreed to the exchange but refused to apply the credit against anything except the railcars actually returned. General Poly informed Allied that a financing bank had a lien on the two railcars which it desired to return to Allied. Allied picked up the two unused railcars of resin, but never delivered the new railcars.

In July of 1981, Allied informed General Poly that it could no longer sell to them on credit, and that all future sales would have to be on a cash basis. General Poly initially agreed, being badly in need of resin, but later reneged due to lack of available cash.

By mid-October of 1981, General Poly had completely exhausted its resin supply and ceased manufacturing operations. In September of 1981, General Poly's financing bank formally called General Poly's notes. Thereafter the company filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act on January 8, 1982.

In August of 1982, General Poly filed this lawsuit alleging that Allied's breach of the agreements between the parties, its breach of fiduciary duty, and its fraudulent actions, resulted in the financial collapse of General Poly and forced it to seek protection from its creditors pursuant to the Bankruptcy Act. Plaintiff's complaint sets forth the following claims:

Count I—breach of the oral joint venture agreement;

Count II—breach of the written agreement;

Count II—unjust enrichment by Allied in having royalty-free access to General Poly's extrusion technology;

Count IV—breach of the financing agreement;

Count V—quantum meruit theory to recover royalty costs for Allied's use of the extrusion technology;

Count VI—conversion;

Count VII—breach of fiduciary duty;

Count VIII—fraud in procuring the two railcars of resin from General Poly in July of 1981;

Counts IX and X—dismissed voluntarily by plaintiff;

Count XI—fraudulent misrepresentation of Allied's development of resin;

Count XII—fraudulent concealment of raw material resin supplies during General Poly's existence in business;

Count XIII—overall scheme to defraud.

Plaintiff seeks as damages its loss of inventory converted by Allied, the difference in cost between the Allied resin which was promised and the cost of cover, lost manufacturing time, incurred and unpaid liabilities to vendors and other creditors—including purchasers of General Poly's industrial revenue bonds, past and future loss of profits, and recovery of the benefit and profits Allied has wrongly retained from its Paxon HMWHD resin without compensation to General Poly. Plaintiff estimates its total actual damages at 50 million dollars. In addition, plaintiff seeks punitive damages of 75 million dollars.

Allied has counterclaimed for the amount of outstanding debt owed it by General Poly Corporation—$179,510.40. Allied has moved for summary judgment on its counterclaim.

A moving party is entitled to summary judgment only when the evidence indicates that no genuine issues of material fact exist. F.R.Civ.P. 56(c); *Maughan v. S.W. Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985). An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. __, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Liberty Lobby*, 477 U.S. at __, 106 S.Ct. 2505, 91 L.Ed.2d at 211-212. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. 477 U.S. at __, 106 S.Ct. at 2511, 91 L.Ed.2d at 212. The court must consider factual inferences tending to triable issues in the light most favorable to the existence of those issues. *United States v. O'Block*, 788 F.2d 1433, 1435 (10th Cir. 1986). The court also must consider the record in the light most favorable to the party opposing the motion. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985). The language of Rule 56(a) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear

the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 265, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

*Breach of Oral Agreement*

The pivotal issue raised by defendant's motion for summary judgment is whether evidence of alleged oral agreements between the parties is admissible to supplement the September 21, 1979 written agreement. Several of plaintiff's claims (Counts II, IV, V, and XI) are based on the alleged "oral joint venture" agreement entered into on January 10, 1979. Plaintiff claims that at the January 10 meeting the parties agreed: (1) General Poly would work with defendant—by providing extrusion technology—to develop an HMWHD film grade resin "as good as Hoechst," the industry standard, by the time General Poly began operations in late 1979; (2) Allied would price its film grade resin within two cents per pound of its injection molding grade resin; and (3) Allied would sell such resin to General Poly on extended credit terms of at least 90 days. In Count I of the complaint, plaintiff claims defendant breached each of these terms.

Defendant contends the written contract, which was signed on September 21, 1979, is the final, integrated agreement between the parties, and thus the parol evidence rule bars admission of the alleged oral agreements. Defendant further argues that even if the court finds the agreement is only partially integrated, the oral terms contradict the terms of the subsequent written agreement and are therefore inadmissible by virtue of the parol evidence rule. Additionally, defendant asserts that the statute of frauds operates as a defense to the admission of the oral terms. In this regard, defendant argues that because this contract is not capable of being performed within one year, the statute of frauds requires all material terms of the contract to be in writing. Accordingly, defendant argues the evidence of the oral terms is inadmissible.

[1] In the September 21 written contract, the parties agreed that New York law would govern. Therefore, on the contract questions, this court need not address conflict of law issues. However, before turning to an analysis of the facts of this case under the New York parol

evidence rule and statute of frauds, the court must determine whether this contract is governed by the Uniform Commercial Code or the common law, or both. Article 2 of the UCC, adopted by New York in 1964, applies to all contracts for the sale of goods. *See* 3 S. Williston, Williston on Contracts § 506B (3d ed. 1960 & Supp. 1986). The parol evidence rule is codified in § 2-202, and the statute of frauds in § 2-201. Sales of goods valued at $500 or more must comply with § 2-201. Both the parol evidence rule and the statute of frauds in the UCC are less stringent than at common law. For instance, in order for a written memorandum to satisfy § 2-201, the writing need not contain all the material terms, but need only indicate that a contract for sale was made. The only term which must appear in the quantity term. The price, time and place of payment or delivery, and the general quality of the goods may be omitted. On the other hand, the "general" New York statute of fraud (general obligations law § 5-701) requires all material terms of the contract to be in writing—resort cannot be made to parol evidence. *Poel v. Brunswick-Balk-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915), *reh. denied* 216 N.Y. 771, 111 N.E. 1098 (1916). Likewise, under the New York common law parol evidence rule, the determination of whether the written contract is integrated must be made without resort to extrinsic evidence and by looking only to whether the document appears incomplete on its face. *Loomis v. New York Central & Hudson River R.R. Co.*, 203 N.Y. 359, 96 N.E. 748 (1911), *reh. denied* 204 N.Y. 588, 97 N.E. 1108 (1912). On the other hand, under the UCC, integration is not presumed. The court must look outside the writing to the proffered oral terms to determine if they would certainly have been included if agreed upon. UCC § 2-201, official comment 3.

Defendant concedes that "one portion of the alleged contract in this case unmistakably relates to the sale of goods and is thus subject to the UCC." (Def. Reply Brief, p. 6.) However, defendant goes on to argue that "it is equally clear that a significant part of the controversy in this lawsuit concerns the quite separable portion of the alleged contract which relates to the *development* of the product rather than the sale of it." *Id.* (emphasis added). Defendant argues this court should bifurcate the contract applying the UCC to the sales portion and the common law to the development portion. In support of its position, defendant relies

on the Tenth Circuit's opinion in *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967), wherein the court divided a contract for the sale of a radio station into the sale of intangibles (*nongoods* such as good will, etc.) and tangibles (*goods* such as equipment and furnishings), applying the UCC only to the latter.

The *Foster* case is distinguishable from the case at bar in that the contract herein does not involve the sale of goods and nongoods. Rather, it involves only the sale of goods. However, the contract is not entirely for the sale of these goods; it also contains a "development" portion. In this way the contract herein is more akin to a mixed sale and service contract. The majority of courts, when dealing with a mixed sale/service contract, employ a "predominant focus test." *Federal Exp. Corp. v. Pan American World Airways, Inc.*, 623 F.2d 1297 (8th Cir. 1980) (applying New York law); *Triangle Underwriters v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979); *Kirby v. Chrysler Corp.*, 554 F. Supp. 743 (D. Md. 1982); *Standard Structural Steel Co. v. Debron Corp.*, 515 F. Supp. 803 (D. Conn. 1980); *Bailey v. Montgomery Ward & Co.*, 690 P.2d 1280 (Col. 1984); *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc.*, 105 A.D.2d 684, 481 N.Y.S.2d 125 (1984); *Care-Display, Inc. v. Didde-Glaser, Inc.*, 225 Kan. 232, 589 P.2d 599 (1979).

Under the predominant purpose test, the court must determine the "essence" or main objective of the parties' agreement. *North American Leisure Corp. v. A & B Duplicators Ltd.*, 468 F.2d 695, 697 (2d Cir. 1972); *Consolidated Edison Co. v. Westinghouse Electric Corp.*, 567 F. Supp. 358, 361 (S.D.N.Y. 1983). If the provision of services or rendition of other performance predominates and is not merely incidental or collateral to the sale of goods, then the contract will not be subject to Article 2 of the UCC. *Dynamics Corp. of America v. Intern. Harvester Co.*, 429 F. Supp. 341, 346 (S.D.N.Y. 1977). *See also Triangle Underwriters v. Honeywell, Inc.*, 604 F.2d at 742.

Defendant argues that the cases which apply the predominant purpose test nearly always involve construction contracts or sale-with-installation contracts in which the relative value of the goods or services is determinable. *See, e.g.*, 5 A.L.R. 4th 502. While this is true as a general rule, the predominant purpose test has been applied in

development/sales contracts such as the one herein. For instance, in *Wico Corp. v. Willis Industries*, 567 F. Supp. 352 (N.D. Ill. 1983), the parties entered a contract which imposed duties of joint obligation to develop the market for silk-screen products used by the electronic game industry and to consult on the design for future products. Wico also agreed to purchase the silk-screen products from Willis on a requirement basis. Willis later breached the contract and Wico sued for rescission and damages. Willis moved to dismiss the claim for rescission arguing that Wico was not entitled to such a remedy under UCC Article 2, as it had accepted the goods and did not allege their nonconformity. Wico argued the contract was for service (development of the market) rather than the sale of goods, so that UCC Article 2 was inapplicable. The court, employing the predominant purpose test, held the sale of goods purpose of the contract predominated, "sale of goods is . . . the raison d'etre of the agreements: all of the service aspects of the agreements are aimed at developing and increasing the market for Willis' graphics, and those graphics were to be sold by Wico. This simply is not a situation in which sale of goods is really incidental to the rendition of services." 567 F. Supp. at 355.

Likewise, in *Aluminum Company of America v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. 1971), the Tenth Circuit Court of Appeals applied the predominant purpose test to a development/sale contract. Defendant Electro Flo was a company which was incorporated for the purpose of making commercial use of an electrified low voltage floor which would provide power to operate "Whirley Dodge" vehicular units for amusement parks. Shortly after its incorporation, employees of the company developed the concept of collapsible electrified floors which could be transported by trailer. Plaintiff Alcoa was an aluminum company which, after several meetings with Electro Flo, became interested in designing the collapsible floor. Plaintiff and defendant eventually entered a contract whereby Alcoa undertook to design and produce the floor within Electro Flo's requirements. Electro Flo agreed to pay tooling expenses and for the necessary materials to produce the aluminum goods. Thereafter, Alcoa produced only inadequate floors which continually failed to meet Electro Flo's requirements. Electro Flo eventually abandoned all materials produced

by Alcoa and sought a new designer. Alcoa sued on an open account for goods sold and delivered. Electro Flo counterclaimed for breach of warranty. The trial court found, applying Article 2 of the UCC, that Alcoa had breached its implied warranty. § 2-314. On appeal, Alcoa argued the transaction should have been characterized as one for professional engineering and design services rather than a sale of goods, and that there is no implied warranty as to professional services. The Tenth Circuit held that "the transaction between Alcoa and Electro Flo, while it involved some engineering and design aspects, was in essence a sale of goods," and refused to bifurcate the contract. 451 F.2d at 1118.

The court's holding in *Electro Flo* was a distinct departure from its bifurcation of a contract in *Foster* into its goods and nongoods elements. The *Electro Flo* and *Wico* cases are clearly analogous to the case at bar. Therefore, this court is persuaded to employ the predominant purpose test in determining whether UCC Article 2 applies to the contract.

It is clear to this court that the thrust of the agreement between Allied and General Poly was the sale and purchase of resin. However, in order to make this sale possible, a suitable resin had to be developed. The development portion of the contract was only incidental to the dominant goal of the sale and purchase of the resin. General Poly was only to pay for the final product, not for the development efforts. Because the "sale" aspect of this contract predominates, Article 2 of the UCC will be applied to the entire contract.

[2] Allied argues that even if the court finds Article 2 applies to the entire contract, the contract still must satisfy *both* the UCC statute of frauds and the common law statute of frauds, as the contract not only concerns the sale of goods over $500 but also cannot be performed within one year. Allied relies on comment (b) to Restatement (Second) of Contracts § 110, which provides:

> The clauses of the English statute apply separately; one contract may be within more than one clause of the statute and facts which except it from one class may not except it from another. Thus

> contracts in consideration of marriage or for the sale of land or goods may also be contracts not to be performed within a year, and the statutory requirements in one clause may be satisfied and those of another clause unsatisfied.

Allied also cites *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 836-37 (2d Cir. 1980), as authority that a contract subject to the statute of frauds for the sale of goods must also satisfy the general statute of frauds if the contract cannot be performed within one year. Allied's reliance on *Nifty Foods*, however, is misplaced. The contract in *Nifty Foods* was entered into in 1961 prior to the adoption of the UCC in New York. The court, therefore, applied the general statute of frauds. The court observed, "at the time of the making of the alleged agreement, New York law also required that a writing purporting to evidence a contract for the sale of goods contain all the terms of the contract." 614 F.2d at 837. Thus, the *Nifty Foods* case offers no guidance as to whether an oral contract for the sale of goods in excess of $500, which cannot be performed within one year, is subject to the requirements of both 2-201 and the general statute of frauds.

This issue was addressed in *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983). In *Roth* the court found the two statutes present an irreconcilable conflict because "not all contracts which are enforceable under [the UCC statute of frauds] satisfy the requirements of [the general statute of frauds]." The court then stated:

> Generally, when an irreconcilable conflict exists between a special statute and a general statute, the special statute prevails as an exception unless the legislature has expressly manifested a contrary intent. [UCC 2-201] is a special legislative attempt to tailor the statute of frauds to the unique characteristics of a commercial sales transaction.

705 F.2d at 141. The court then concluded the UCC was an exception to the more general statute of frauds and, therefore, the contract need only satisfy the requirements of 2-201. *See also Highland News Co., Inc. v. The Hearst Corp.*, slip op. 80-413-T (D.Mass. Jan. 22, 1986).

New York follows the rule employed by the *Roth* court that if a conflict exists between a general statute and a special statute, the latter will control. *See Harris v. Jacobs*, 69 Misc.2d 4, 329 N.Y.S.2d 229 (1972); *Erie Co. Water Authority v. Kramer*, 4 App. Div. 2d 545, 167 N.Y.S.2d 557 (1957). Therefore, because the statutes in this case involve an irreconcilable conflict as to whether all material terms need be included in the written contract, the UCC statute of frauds must be deemed controlling in this case. In the court's view, this outcome is reconcilable with comment (b) to § 110 of the Second Restatement. The comment specifically states that "the clauses of the *English* [or traditional] statute apply separately." This comment does not address contracts which fall within both the UCC and the traditional statute, but rather contracts which fall within more than one clause of the traditional statute.

UCC § 2-201, the applicable statute of frauds in this case, provides:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

As noted in the official comment, "The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction."

Clearly, the September 21 written contract satisfies the requirements of § 2-201. Moreover, because § 2-201 does not require the inclusion in the writing of all material terms, it does not operate as a bar to plaintiff's proffered evidence of a prior oral agreement. *See Dorman v. Cohen*, 66 A.D.2d 411, 413 N.Y.S.2d 377 (1979). Accordingly,

evidence of the alleged oral agreement will be admissible unless barred by the parol evidence rule as set forth in § 2-202, which provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade . . . or by course of performance; and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Allied contends the court must find the September 21 contract was intended as a complete and exclusive statement of the parties' agreement, thereby precluding admission of any additional terms. Allied asserts that a "facial completeness" test must be employed by the court in making this finding. Allied argues that under this test the contract is clearly complete. Allied further argues that in the event the court finds there are any "gaps" in the contract—such as price term—the court must not find the document incomplete, but instead must utilize the UCC "gap-filler" statutes to fill the gaps rather than resort to parol evidence. Alternatively, Allied argues that even if the court finds the agreement is only partially integrated, the proffered oral agreement contradicts, rather than supplements, the written agreement and is therefore inadmissible as a matter of law.

[3] The question of whether a written contract is fully integrated—thus precluding introduction of any parol evidence—is characterized as a question of fact, yet is it to be determined by the judge outside the presence of the jury. *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 763 (10th Cir. 1983). Under the UCC there is no presumption that a writing which is final as to some material facts is the complete and exclusive agreement of the parties. UCC § 2-202, official comment (1)(a). Under New York law the court must first examine the "facial

completeness" of the writing. *Phillips Brothers v. El Salton, S.A.*, 487 F. Supp. 91, 94 (S.D.N.Y. 1980). The more complete a writing appears to be on its face, the less likely it is that any extrinsic terms are agreed upon. *Whirlpool Corp. v. Regis Leasing Corp.*, 29 S.D.2d 395, 288 N.Y.S.2d 337 (1968). The determination of the facial completeness of the written document in this case is appropriate at the summary judgment stage.

[4] While the written contract herein evidences the parties had agreed General Poly would have the first right to purchase up to 50,000 pounds of film grade resin each month, the contract does not set forth the price, credit terms, quality of goods, or date of delivery. These omissions—in the view of this court—render this agreement facially incomplete. Allied relies heavily on the case of *Loomis v. New York Central & Hudson River R.R.*, 203 N.Y. 359, 96 N.E. 748, in arguing that the contract herein is *not* facially incomplete. *Loomis* involved a printed form contract in which the space for the designation of the delivery route had been left blank. The New York Supreme Court held that the contract was complete on its face despite this missing term. The court stated the date was "merely incidental and not essential to a perfect agreement . . . the effect of not specifying the route was simply to leave that subject open to the choice of the carrier." 203 N.Y. at 368, 96 N.E. 748.

Unlike the routing directions in *Loomis*, the missing terms in the case at bar are material and not merely incidental. For instance, the quality of the goods was of utmost importance to the parties; otherwise the whole development program would have been unnecessary.

Moreover, the contract does not contain a merger or integration clause. When a merger clause is present, there is presumption that the writing is fully integrated. J. White & R. Summers, Uniform Commercial Code, § 2-12 (1972). The omission of a merger clause—while not creating a presumption of incompleteness—is a factor that courts may consider in determining whether a document is incomplete. *See Computerized Radiological Services, Inc. v. Syntex Corp.*, 595 F. Supp. 1495, 1505 (E.D.N.Y. 1984); *Drake v. Handman*, 30 F.R.D. 394, 396

(S.D.N.Y. 1962); *Goodrich v. Farmers Feed & Supply Co., Inc.*, 55 Or. App. 287, 638 P.2d 1148 (1981).

[5] Allied argues that under the UCC the written agreement is not "facially incomplete" due to the omission of the price, credit, quality and delivery terms, because these terms are to be filled in by the UCC's "gap-filler" statutes embodied in § 2-305 (price), § 2-309 (delivery) and § 2-310(a) (time of payment). There is no question that under the UCC *unless otherwise agreed upon* the price to be paid is the "reasonable" price, or market price. UCC § 2-305; *Pulprint, Inc. v. Louisiana-Pacific Corp.*, 124 Misc.2d 728, 730, 477 N.Y.S.2d 540 (1984). Also, *unless otherwise agreed upon*, delivery is to be made within a reasonable time (§ 2-309) and payment will be due upon delivery (§ 2.310(a)).

However, where there is an agreement setting forth a specific price, time of delivery, and payment, the court is bound to enforce the agreement. In this regard, if there is evidence of an oral agreement as to these terms *which is admissible* under § 2-202 (i.e., supplements the written agreement where not inconsistent and where the writing is not intended as a complete and exclusive statement of the agreement), the court must enforce the agreed terms rather than utilize the gap-filler statutes.

In *George v. Davoli*, 91 Misc.2d 297, 397 N.Y.S.2d 895 (1977), the plaintiff and defendant had entered a contract for the sale of jewelry on approval. The written contract was silent as to the time within which the jewelry had to be returned. The trial court allowed defendant to testify as to the parties' oral agreement on time for return, thereby barring plaintiff's claim for a refund. On appeal, plaintiff argued the UCC gap-filler statutes (§§ 2-326, 2-327), which provide that goods must be returned "seasonably" should have been applied, rather than admission of parol evidence. The appellate court affirmed the lower court, stating, "Returning the merchandise within one week as is the situation in the present case would ordinarily be seasonable or within a reasonable time. *However, where there is an agreement setting forth a specific time limit, the court is bound to enforce such limit.*" (Emphasis added.) Of course, before the court would admit the parol

evidence, it ascertained its admissibility under § 2-202. If the evidence had been barred by § 2-202, then—and only then—would the gap-filler statutes have been utilized. *See also Anderson v. Nafziger*, 100 Idaho 175, 595 P.2d 709 (1979).

Allied has cited no cases which hold that the gap-filler statutes are to be used to complete an incomplete agreement despite the existence of an admissible oral agreement as to those matters. Accordingly, this court is not bound to invoke the gap-filler statutes unless the proffered oral evidence is inadmissible under § 2-202.

Because the contract is incomplete on its face, the court must conclude that the September 21 contract was only a partial memorialization of the parties' previous negotiations and agreements. Allied argues the extrinsic evidence in this case shows the parties intended the writing to embody their entire agreement. However, as stated previously, there is no presumption to this effect under UCC § 2-202. Rather, Allied must prove this was the parties' intent. The true intent of the parties in this case is highly controverted. Therefore, this issue is inappropriate for resolution at the summary judgment stage.

[6] Allied next argues it is entitled to summary judgment on its claim because even if the agreement is not fully integrated, the parol evidence proffered by plaintiff is inadmissible as it contradicts the terms of the written agreement. Under § 2-202, if an agreement is only partially integrated, parol evidence of *consistent additional terms* may be admitted. To be consistent, such terms must not contradict or vary the written contract. Or, stated another way, "to be inconsistent the [oral] term must contradict or *negate* a term of the writing. A term of condition which has a lesser effect is provable." *George v. Davoli*, 91 Misc.2d at 296, 397 N.Y.S.2d 895.

Plaintiff alleges—as to the development portion of the agreement—that the parties agreed plaintiff would assist Allied in the development, testing, and processing of resin, and provide Allied with access to its extrusion technology, equipment, and personnel, and that Allied would assign Mr. Snell to the development program. Allied concedes this evidence merely supplements, but does not contradict, the written

agreement. Therefore, the evidence is not inadmissible if the September 21 contract is found to be only a partial memorialization of the parties' agreement.

As to the sale portion of the agreement, plaintiff alleges the parties orally agreed upon the following terms which were omitted from the written agreement:

(1) The price term—2¢/lb. over the price of injection grade molding resin;

(2) The credit term—extended credit of at least 90 days after delivery;

(3) The quality term—"as good as Hoechst";

(4) The delivery date—by the end of 1979.

Allied first argues the alleged oral agreement as to price and credit terms contradicts the "first right to purchase" language in the written agreement. Allied maintains that a "first right to purchase" is equivalent to a "first right of refusal" which courts have held creates a right to purchase the property in question on the same terms and at the same price as the seller is willing to sell to other buyers. The cases on which Allied relies involve sales—usually of real estate—in which the buyer with the right of first refusal has an option to match the highest bid of a third party. *See Costello v. Hoffman*, 30 A.D.2d 530, 291 N.Y.S.2d 116 (1968); *Turner v. Shirk*, 49 Ill. App. 3d 764, 7 Ill. Dec. 461, 364 N.E.2d 622 (1977); *Klein v. Brodie*, 167 Mont. 47, 441 P.2d 128 (1968); *Bennett v. Veneer Factors, Inc. v. Brewer*, 73 Wash. 2d 849, 441 P.2d 128 (1968); *Brownies Creek Collieries, Inc. v. Asher Coal Mining Co.*, 417 S.W.2d 249 (Ky. 1967). Conversely, the first right of purchase in this case does not contemplate "matching" other buyers. Rather, it simply provides General Poly the contractual right to purchase the first 500,000 pounds of resin each month. Such a term—in the view of this court—does not imply the price or payment terms. Therefore, parol evidence of an agreement as to price and credit terms does not contradict the written contract and is not inadmissible for this reason.

Allied argues the alleged oral agreement that Allied would develop a resin "as good as Hoechst 9255F"—the industry standard—contradicts the written contract's reference to "film grade resin." (¶ 1.2.) However, "film grade" simply describes the product—it is not a quality term. Therefore, if a quality term such as the one alleged by Allied was in fact agreed upon, it merely supplements the written agreement. In this regard, it is noteworthy that the "whereas" clauses of the written agreement refer to the development of resin "having special characteristics." Clearly, this phrase requires extrinsic evidence to explain what is meant by "special characteristics." Accordingly, the oral agreement as to the quality of the resin is a "consistent additional term" and, therefore, is admissible to explain or supplement the written agreement.

Allied further argues the alleged oral agreement that Allied would have resin available in commercial quantities by the fall of 1979 squarely contradicts the written contract. Paragraph 1.1 of the written agreement provides for a "one (1) year period of joint cooperation" commencing "upon *execution* of this agreement," during which the parties "shall cooperate with each other to develop high density polyethelene resins." (Emphasis added.) Also, ¶ 1.2 of the written agreement states that Allied's supply commitment to General Poly shall commence "with the production on a semi-commercial or commercial scale of any new high density polyethelene film grade resin," but does not specify a date.

Plaintiff, on the other hand, argues there is no inconsistency. Plaintiff contends the 1-year period of joint cooperation began in January of 1979, when the parties entered their oral agreement, rather than when the written agreement was finally signed in September of 1979. Plaintiff points out Allied began testing its experimental resin as early as March of 1979 (the Peru test), and that Allied would not have done this if the parties had not previously agreed to secrecy. Plaintiff also argues the statement in the written agreement that plaintiff's first right of purchase would begin when Allied began producing resin on a semi-commercial or commercial scale is not inconsistent with the promise that this production would begin in the

fall of 1979. Plaintiff argues, "by keying in on the actual date of first production, ¶ 1.1 simply provided a mechanism for assigning a precise starting date for the three-year right of purchase." (Pl. Resp., p. 70, fn. 5.)

The court is not prepared to rule at the summary judgment stage that the "delivery term" is inconsistent. If—as Allied argues—the parties intended the written agreement to be their exclusive agreement and, therefore, the statement that the joint development would begin "upon execution" meant "on September 21, 1979," then a promise to deliver by the fall of 1979 appears to be inconsistent. However, if the September 21 contract simply memorializes—and does not exclude—the alleged oral agreements of January, 1979, then a promise to supply resin by late 1979 is not inconsistent with an agreement for a 1-year period of development which *began* in January of 1979. These conclusions, however, cannot be drawn at this summary judgment stage.

A final bar to the admission of even consistent additional terms to an incomplete document is when the additional terms are such that the parties would certainly have included them in the written document if agreed upon. In official comment 3 to § 2-202, it is stated, "If the additional terms are such that, if agreed upon, they would certainly have been included in the document *in the view of the court*, then evidence of their alleged making must be kept from the trier of fact." (Emphasis added.) *See also Tropical Leasing, Inc. v. Fiermonte Chevrolet, Inc.*, 80 A.D.2d 467, 439 (N.Y.S.2d 566 (1981).

The terms missing from the contract in this case, while material, are not terms which in the view of this court would definitely have been included if agreed upon. According to plaintiff, the parties originally intended to memorialize only the development portion of their agreement—the first right to purchase provision was only added at the request of plaintiff in order to assure the bond underwriters that Allied had in fact agreed to supply them with resin. It is not at all surprising that Allied, when reducing the contract to writing, did not include all the sale terms which were favorable to plaintiff. Plaintiff undoubtedly believed their oral agreement on these terms was sufficient.

Based on all of the foregoing, it is the court's decision that Allied is not entitled to summary judgment on the breach of oral contract claim.

*Breach of Written Contract*

[7] Allied next contends it is entitled to summary judgment on plaintiff's claim for breach of the written contract (Count II). Allied claims the uncontroverted facts show there was no breach of the written contract whatsoever.

In the pretrial order, plaintiff claims the first right to purchase provision in the September 21 agreement was breached by Allied when it "withheld resin . . . suitable for General Poly for months, while attempting to move such resin to General Poly's competitors." (PTO, p. 5). Plaintiff also claims the first right to purchase provision was violated when Allied withdraw extended credit terms from plaintiff, thereby cutting off plaintiff's ability to purchase. Plaintiff also claims the agreement was breached because Allied failed to ever supply plaintiff with suitable resin.

These claims rest on controverted facts. The court is not prepared to rule at the summary judgment stage that Allied was entitled to breach the first right to purchase provision due to plaintiff's delinquency on payments for off grade resin. Plaintiff has contended that the unsatisfactory quality of the resin caused its delinquency. Plaintiff is entitled to argue these points to the jury.

*Unjust Enrichment & Quantum Meruit*

[8] In Counts III and V, plaintiff seeks to recover under alternate theories of unjust enrichment and quantum meruit for Allied's royalty-free access to General Poly's extrusion technology. Allied argues these claims must be dismissed as the September 21 agreement specifically provided for the royalty-free access to the extrusion technology.

Having found the September 21 written agreement enforceable under the statute of frauds, the court must agree with Allied on these claims insofar as they are covered by that agreement. However, the

court will suspend granting summary judgment on these claims until it is determined if the alleged oral agreement of January, 1979 is admissible. If it is not, Allied's royalty-free rights did not begin until September 21. Because the evidence will show that Allied made use of plaintiff's extrusion technology prior to September 21, plaintiff may still be able to claim it is entitled to compensation for such use under its alternate equitable theories.

*Breach of Finance Agreement*

Allied next argues it is entitled to summary judgment on Count IV, plaintiff's claim for breach of the parties' finance agreement (extended credit terms). This claim is incorporated into Counts I and II, and plaintiff has agreed to treat it as such. As previously stated, Allied is not entitled to summary judgment on either Counts I or II.

*Breach of Fiduciary Duty*

Allied next contends summary judgment should be entered on plaintiff's claim for breach of fiduciary duty/constructive fraud (Count VII). Plaintiff's claim is that the parties, by virtue of their "joint venture agreement," owed fiduciary duties to one another, and that Allied's conduct over the course of their association was a breach of its fiduciary duties of honesty and fair play. In its motion, Allied asserts that as a matter of law the parties' agreement did not create a joint venture and, therefore, it owed no fiduciary duty to plaintiff.

The parties are in agreement that Kansas law applies to this claim, and also to the fraud claims. The court will proceed on this premise.

The existence of a fiduciary relationship depends on the facts and circumstances of each individual case. *See Denison State Bank v. Madeira*, 230 Kan. 684, 640 P.2d 1235 (1982). "Whether such a relation is shown to exist is an evidentiary question. It is a question which must be determined in each case by the trier of fact." *Wilkinson v. Cummings*, 194 Kan. 609, 612, 400 P.2d 729 (1965).

In *Denison State Bank* the Kansas Supreme Court recognized that generally there are two types of fiduciary relationships:

> (1) Those specifically created by contract such as principal and agent, attorney and client, and trustee and cestui que trust, for example, and those created by formal legal proceedings such as guardian and/or conservator and ward, and executor or administrator of an estate, among others, and (2) those implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transaction. The determination of the existence of a fiduciary relationship of the first category, though not without problems on occasion, is usually relatively simple. The second category . . . becomes more difficult to determine and must depend upon the facts in each case.

230 Kan. at 691, 640 P.2d 1235.

If the parties' agreement created a joint venture, then a fiduciary relation would exist between the parties under the first category, as a joint venture is governed by the same rules of law as partnerships. *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, 76, 596 P.2d 816 (1979); 46 Am. Jur. 2d, Joint Ventures § 50, p. 69. The criteria for finding the existence of a joint venture was set forth in *Cinderella Homes* as follows:

> [T]he cases indicate that a joint venture in *an association of two or more persons or corporations to carry out a single business enterprise for profit*; it may be found in the mutual acts and conduct of the parties. Among the acts or conduct which is indicative of a joint venture, but no single one of which is controlling in the determination, are: (1) the joint ownership and control of property; (2) the sharing of expenses, profits and losses, and having and exercising some voice in determining the division of the net earnings; (3) a community of control over and active participation in the management and direction of the business enterprise; (4) the intention of the parties, express or implied; and (5) the fixing of salaries by joint agreement. The following acts or conduct have also been mentioned as being helpful, but one authority does not consider them so: (a) investment in the business of undistributed profits for the purpose

> of building up a substantial cash reserve; (b) the charging of losses against accumulated profits; and (c) division of undistributed profits in the event of liquidation contingent upon repayment to one of the parties of cash originally invested in capital.

226 Kan. at 76, 596 P.2d 816 (emphasis added).

Plaintiff claims that a joint venture was created by virtue of the parties' agreement to "(1) exercise joint control over certain property, namely, the extrusion technology of General Poly and the developmental resources of Allied; (2) share risk of loss of the value of services and cooperative efforts rendered under the agreement; and (3) exercise mutual control, each according to its specialty, over the joint development of the product." (Pl. Resp., p. 79.)

**[9]** Where the existence of a joint venture is controverted, the relationship may be found in the mutual acts and conduct of the parties. *Cinderella Homes*, 226 Kan. at 77, 596 P.2d 816. In this case, the court is convinced that even when the evidence is viewed in the light most favorable to plaintiff, a joint venture cannot be said to exist. While the parties had agreed to *cooperate* and work in conjunction with each other to develop the resin, they simply were not carrying out a "*single* business enterprise for profit."

**[10]** However, this is not to say that a fiduciary relationship did not exist between the parties due to the special nature of their contractual relationship. If such a relationship existed, it was one "*implied in law* due to the factual situation surrounding the involved transactions and the relationships of the parties to each other and to the questioned transaction." *Denison State Bank*, 230 Kan. at 691, 640 P.2d 1235 (emphasis added). In this case, there is a fact question as to whether such a relationship did exist.

Generally, a buyer/seller relationship does not create a fiduciary duty because the parties are dealing at arm's length and seeking for themselves the best advantage. *See Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d at 838. However, the facts in this case

except it from the general rule. In *Denison State Bank*, the Kansas Supreme Court recognized that the right set of facts may create a fiduciary relationship even though the relationship itself (e.g., bank/depositor) is not fiduciary in nature.

In *Lindholm* v. *Nelson*, 125 Kan. 223, Syl. ¶ 3, 264 Pac. 50 (1928), the Kansas Supreme Court stated:

> A fiduciary relation does not depend upon some technical relation created by, or defined in, law. It may exist under a variety of circumstances, and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of one reposing the confidence.

In *Denison State Bank*, the court recognized that fraudulent concealment is a breach of a fiduciary duty. The court quoted from *Wolf* v. *Brungardt*, 215 Kan. 272, 282, 524 P.2d 726 (1974), as follows:

> "Where one party to a contract or transaction has superior knowledge, or *knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence*, or means of knowledge which are not open to both parties alike, he is under a legal obligation [in essence, fiduciary] to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expedience of the bargain."

230 Kan. at 693, 640 P.2d 1235.

In the case at bar, plaintiff alleges that Allied concealed certain material facts of which it had superior knowledge from plaintiff. Specifically, plaintiff claims that Allied concealed that the resin tested at the Lima, Peru plant was not Allied's own resin. Plaintiff also claims that Allied concealed the availability of good quality resin in the summer of 1980 and the spring of 1981. Moreover, plaintiff claims it relied on Allied's oral promises in making its decision to go into business in the first instance, and that Allied's breach of these promises was constructive fraud.

Plaintiff's allegations set forth a sufficient basis on which a jury could find a breach of a fiduciary duty based on the unique relationship of the parties in their cooperative development of the resin, and based on Allied's fraudulent concealment. Accordingly, Allied is not entitled to summary judgment on his claim.

*Fraud & Conversion: Failure to Replace Railcars of Resin*

[11] In Counts VI and VIII of the complaint, plaintiff alleges Allied committed fraud and conversion by failing to fulfill a promise to replace two railcars of poor quality resin, which were secured by plaintiff's bank, with two railcars of high quality resin. Allied contends it is entitled to summary judgment on both claims as plaintiff has failed to set forth sufficient facts to support the claims.

To review the facts involved, plaintiff contends that in June of 1981 it had two full railcars of very poor quality resin which it had previously obtained from Allied. These railcars were subject to a security interest held by plaintiff's bank. Plaintiff had recently completed tests on Allied's new experimental resin and concluded Allied had finally produced a resin "as good as Hoechst." Walker and Traver informed Allied of their desire to purchase the new resin. At a June 3, 1981 meeting at plaintiff's plant, Allied offered to take back the two railcars of poor quality resin and replace them with the new resin. General Poly agreed to the exchange *if* the replacement railcars would be shipped by the end of the month so as not to impair the security interest held by the bank. The railcars of poor resin were later picked up by Allied but never replaced as promised. In July of 1981, Allied informed General Poly that its extended credit had been withdrawn, but that it could purchase a railcar of the new resin for cash. As it had no alternative and needed the resin, General Poly agreed.

Allied claims plaintiff can produce no evidence showing there was a binding agreement the railcars would be replaced, and further, that any such promise was made with fraudulent intent.

The court must disagree with Allied's position. Traver's affidavit, in and of itself, is sufficient to create a fact question as to what promises were made about replacing the returned railcars. The intent—fraudu-

lent or otherwise—of Allied's representatives cannot be determined by this court as a matter of law. This is clearly a jury question.

In order to establish fraudulent misrepresentation, the plaintiff must set forth facts which show: (1) that an untrue statement was made as a statement of material fact; (2) that the statement was known to be untrue by the party making it and was made with the intent to deceive or recklessly made with disregard for the truth; (3) that the party alleging fraud justifiably relied on the statement; and (4) that as a result of this reliance the party alleging fraud was damaged. *Nordstrom v. Miller*, 227 Kan. 59, 65, 605 P.2d 545 (1980). *See also Professional Investors Life Ins. Co. v. Roussel*, 528 F. Supp. 391, 396 (D. Kan. 1981). Plaintiff must prove its claim by clear and convincing evidence. *Nordstrom*, 227 Kan. at 65, 605 P.2d 545.

The existence of fraud is a question of fact. *Nordstrom*, 227 Kan. at 65, 605 P.2d 545. It is for the jury—not this court—to determine the credibility of the witnesses as to what representations were made and whether such representations were made with fraudulent intent. At this summary judgment stage, plaintiff has, by Traver's affidavit and depositions of Allied's Heath and Wiley, set forth facts sufficient to support a verdict based on clear and convincing evidence. *Celotex Corp. v. Catrett*, 477 U.S. at ___, 106 S.Ct. at 2553, 91 L.Ed.2d at 274.

The conversion claim also rests on controverted fact and Allied is not entitled to judgment thereon as a matter of law. Conversion is defined as the "unauthorized assumption and exercise of the right of ownership over the goods or chattel belonging to another." *Nelson v. Hy-Grade Construction & Materials, Inc.*, 215 Kan. 631, 527 P.2d 1059 (1974). Allied argues that because it was *authorized* to pick up the two railcars of poor quality resin, its action in doing so was not a conversion. However, this "authorization" was allegedly obtained through the misrepresentation that Allied would replace these railcars. "To take possession of personal property where the consent of the owner is induced by fraudulent misrepresentation is a conversion." 18 Am. Jur. 2d, Conversion § 32, p. 165; Restatement (Second) of Torts § 252A. Accordingly, if plaintiff can establish its claim of fraudulent misrepresentation, it can also establish conversion. Therefore, Allied is not entitled to summary judgment on this claim.

*Fraudulent Misrepresentation: Development of Resin*

[12] In Count XI of the complaint, plaintiff claims Allied fraudulently misrepresented and concealed the true status of its development of resin. Plaintiff alleges it detrimentally relied on these representations by going ahead with obtaining bond underwriters, purchasing and installing extrusion equipment, and beginning manufacturing operations. Specifically, plaintiff claims Allied, knowing plaintiff would rely on the resin test conducted at the PeruPlast Plant in Lima, Peru, sent boxes of resin for testing which were designated as "Allied Developmental Resin" and labeled "Paxon 7-392 and 6-100" (Allied's trade names), when, in fact, the resin was re-marked boxes of Solvay Eltex B5920F, a European-made resin. Allied never informed plaintiff that this resin, which tested quite successfully, was not Allied's own resin.

Allied claims it is entitled to summary judgment because (1) plaintiff was not justified in relying on the Peru tests, as later tests revealed the true state of Allied's resin development, and further, the September 21 agreement specified the development efforts would *begin* on September 21; and (2) even if plaintiff did rely on the tests and can establish fraud, the claim is barred by the applicable statute of limitations, K.S.A. 60-513(a)(3), as plaintiff could reasonably have discovered the fraud more than two years before filing this action.

The court will adamantly deny Allied's motion as to this claim. The facts, when viewed in the light most favorable to plaintiff, show that Allied knowingly represented that a European resin was its own experimental resin and never revealed the truth. Clearly, plaintiff relied on these first experimental tests in proceeding with financing and building its plant. The fact that the August, 1979 test, and later tests, revealed a poor quality resin—while certainly a concern—did not eviscerate plaintiff's right to rely on the Peru tests and Allied's continued assurances that the perfect resin was "just around the corner." Plaintiff has unarguably alleged sufficient facts by which a jury could find fraud under a clear and convincing standard. This issue is ever deserving of resolution by a trier of fact.

Likewise, whether the statute of limitations is a bar because plaintiff could, with due diligence, have "reasonably discovered" the fraud prior to August of 1980 (two years before the filing of this lawsuit) must be decided by the trier of fact. The point of reasonable discovery is a question of fact. *Wolf v. Preferred Risk Life Ins. Co.*, 728 F.2d 1304, 1306 (10th Cir. 1984). Plaintiff maintains it could not have reasonably discovered the fraud—even by exercising due diligence—until after discovery began and plaintiff had access to Allied's internal documents. In light of Allied's repeated assurances that its resin was nearly perfected, and the unique "cooperative" relationship between the parties, this court is not prepared to rule as a matter of law that plaintiff could reasonably have discovered the concealment. Accordingly, defendant's motion is denied as to this claim.

*Fraudulent Concealment: Availability of Resin*

Allied next claims it is entitled to summary judgment on plaintiff's claim that Allied fraudulently concealed the availability of resin in July of 1980 and again in the spring of 1981. Allied argues it had no obligation to advise General Poly of the existence of specific lots of resin as they were produced, and, in any event, plaintiff's "first right to purchase" was conditioned on its giving 30 days' written notice. According to Allied, plaintiff gave no notice of its desire to purchase resin in either July, 1980 or the spring of 1981.

Plaintiff, on the other hand, alleges that because of the extremely poor quality of the resin it had purchased from Allied, Allied did have a duty—under the first right to purchase provision—to inform plaintiff if and when experimental lots were actually produced in commercial quantities. General Poly maintains it could not have been expected to place orders until it received information from Allied that high quality resin could actually be produced in commercial quantities. Plaintiff states that in July of 1980 Allied had produced a resin which its tests showed would be suitable for General Poly, yet Allied failed to inform General Poly of the test results until September of 1980, *after* it had offered to sell the resin to another buyer. Plaintiff further claims that in the spring of 1981, it tested what it believe was experimental resin and the test results were extremely good. However, Allied did not

inform General Poly that it could (and had) produced this resin in commercial quantities, and did not so inform General Poly until it had filled orders of other customers. General Poly claims Allied had a duty to disclose all this information to it under the first right to purchase provision, and that Allied's failure to do so was fraudulent concealment.

As previously stated, fraudulent concealment is actionable in Kansas. In *Wolf v. Brungardt*, 215 Kan. at 282, 527 P.2d 1059, the Kansas Supreme Court defined fraudulent concealment as the failure of a party to a contract who has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, to communicate to him the true state of facts. Again, the facts underlying this claim are controverted. The court is therefore unable to find that as a matter of law Allied is entitled to summary judgment on this claim.

*Overall Scheme to Defraud*

Finally, Allied contends plaintiff's claim in Count XIII, alleging Allied engaged in an overall scheme to defraud, is not pleaded with sufficient particularity, is redundant, and should be stricken.

Plaintiff has adequately alleged fraud claims in Counts VIII, XI and XII. To the extent that the "overall scheme" claim incorporates these claims, it is sufficiently pled as well. To the extent that this claim is redundant and seeks only an alternative claim for relief, it will be stricken.

*Counterclaim*

Allied counterclaimed in this action on plaintiff's debt of $179,510.40. Plaintiff has admitted liability. Accordingly, the court will grant summary judgment on this claim as a setoff to any recovery plaintiff may obtain in this action. 11 U.S.C. §§ 507, 726.

IT IS ACCORDINGLY ORDERED this 30 day of October, 1986, that defendant's claim for summary judgment on plaintiff's claims is denied, except as to Count XIII, but summary judgment is granted to defendant on its counterclaim.

Additionally, the court has reviewed counsels' briefs regarding defendant's motion to strike certain witnesses, or, in the alternative, to reopen discovery for purposes of taking additional depositions. The motion is overruled.

This matter is now scheduled to commence jury trial on January 6, 1987. Counsel are directed to file their trial briefs, summaries of key witness testimony and requested instructions on or before January 2, 1987, and to appear in chambers on January 5, 1987, at 3:30 P.M., for a status conference and for consideration of in limine motions, should they arise.